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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Yvonne Gonzalez Rogers, Judge

CHASOM BROWN, ET AL.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. CV 20-03664-YGR
)	
GOOGLE LLC,)	
)	
Defendants.)	
_____)	

Oakland, California
Wednesday, November 29, 2023

TRANSCRIPT OF PROCEEDINGS

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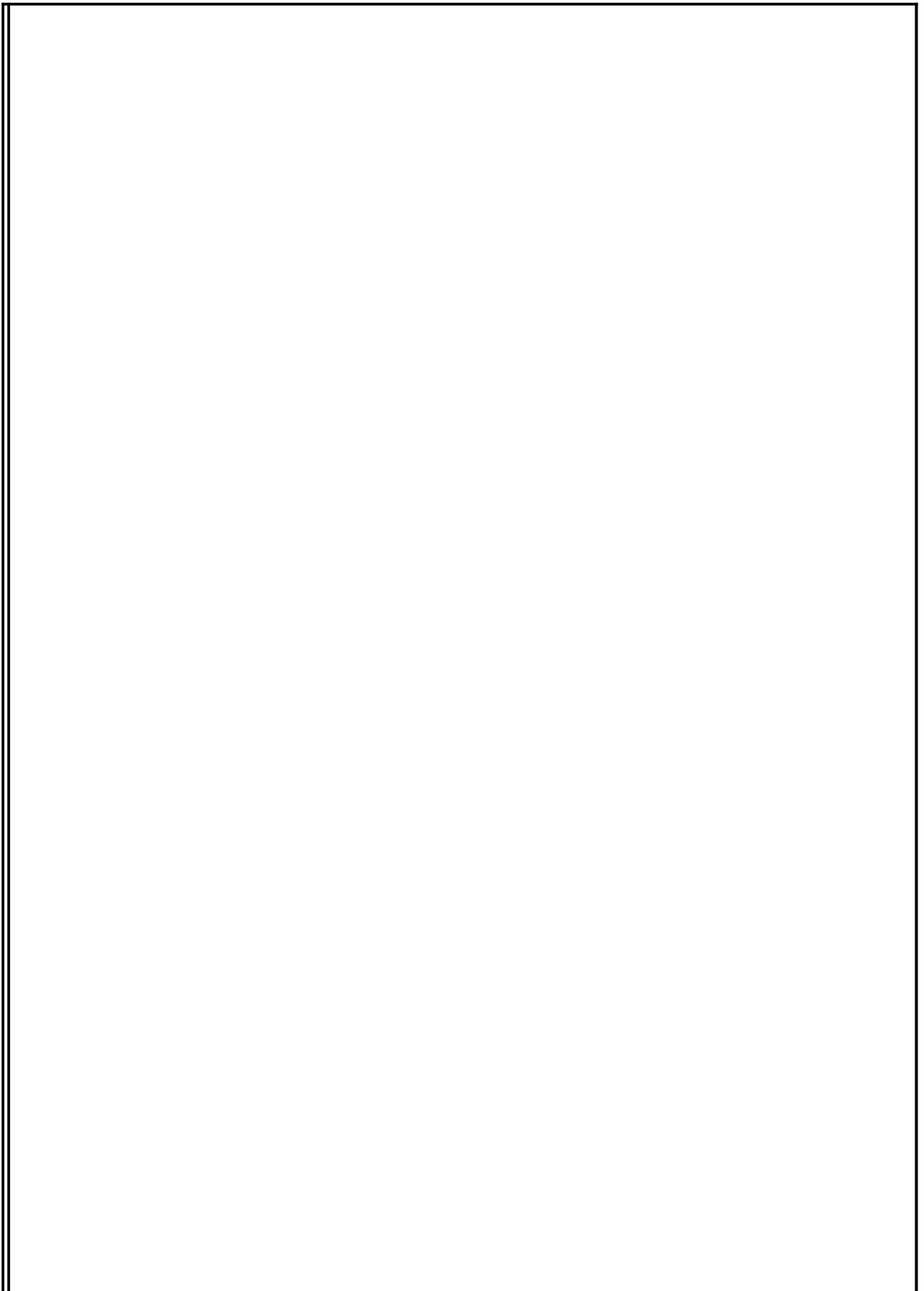
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Wednesday - November 29, 2023

8:55 a.m.

P R O C E E D I N G S

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THE CLERK: Good morning, everyone. Calling the matter of CV 20-3664-YGR, Brown, et al. vs. Google LLC, et al.

Parties, please step forward and state your appearances for the record, starting with the plaintiff.

MR. BOIES: Good morning, Your Honor. David Boies of Boies Schiller & Flexner representing the plaintiff.

THE COURT: Good morning, Mr. Boies. All right. So let's go around so I get to you know you all better. I think I know most of you, but we'll see.

MS. BONN: Good morning, Your Honor. Amanda Bonn with Susman Godfrey for the plaintiffs.

THE COURT: Good morning. Why don't you all just line up here so we're not waiting for you to get to the mic.

MR. FRAWLEY: Good morning, Your Honor. Alexander Frawley from Susman Godfrey for the plaintiffs.

THE COURT: Good morning.

MR. LEE: Good morning, Your Honor. James Lee, Boies Schiller Flexner, for the plaintiffs.

THE COURT: Yes, Mr. Lee.

MR. MAO: Good morning, Your Honor. Mark Mao with Boies Schiller Flexner the plaintiffs.

1 **THE COURT:** Mr. Mao.

2 **MR. MCGEE:** Good morning, Your Honor. Ryan McGee of
3 Morgan and Morgan, also for the plaintiffs.

4 **THE COURT:** Good morning.

5 **MR. WRIGHT:** Good morning, Your Honor. Logan Wright
6 with Boies Schiller & Flexner, also for the plaintiffs.

7 **THE COURT:** Hold on, hold on. I did not have you
8 highlighted, Mr. Wright. So Logan Wright. Okay.

9 **MR. SILA:** Good morning, Your Honor. Ryan Sila,
10 Susman Godfrey, for the plaintiffs.

11 **THE COURT:** Hold on. Okay. Give me your name again.

12 **MR. SILA:** Ryan Sila.

13 **THE COURT:** Are you on the docket? Ryan Sila. I
14 thought you said "Brian."

15 **MR. SILA:** Happens all the time. Thanks, Your Honor.

16 **MR. YANCHUNIS:** Good morning, Your Honor. John
17 Yanchunis with Morgan and Morgan, also for the plaintiffs.

18 **MR. REBLITZ-RICHARDSON:** Good morning, Your Honor.
19 Beko Reblitz-Richardson, also for the plaintiffs.

20 **THE COURT:** Good morning.

21 And you have, Mr. Mao, a few other people with you?

22 **MR. MAO:** I'm sorry, Your Honor?

23 **THE COURT:** Do you have a few other people with you.

24 **MR. MAO:** Yes, sorry.

25 **MR. STEIN:** Good morning, Your Honor. Joshua Stein,

1 Boies Schiller & Flexner, for the plaintiffs.

2 **THE COURT:** Are you a lawyer?

3 **MR. STEIN:** Yes, Your Honor.

4 **THE COURT:** Okay. Mr. Stein.

5 **MS. LAVARE:** Good morning, Your Honor. Lauren LaVare
6 with Boies Schiller & Flexner, also an attorney.

7 **THE COURT:** Hold on. Hold on. I see Mr. Stein. Tell
8 me your last name again.

9 **MS. LAVARE:** LaVare, Your Honor.

10 **THE COURT:** LaVare. Okay. Ms. LaVare. I'm not
11 seeing you on our list.

12 How do you spell your last name?

13 **MS. LAVARE:** L-A capital V-A-R-E.

14 **THE COURT:** You may want to check the docket because
15 I'm not seeing you as identified.

16 **MR. MAO:** Your Honor, Professor Sam Asarnaw is also
17 appearing remotely.

18 **THE COURT:** So at this point, I'm not allowing
19 speaking participation. I understand he might be on the
20 platform. If there's a need, then I will open that up, but at
21 this point, I'm not doing that.

22 **MR. MAO:** Understood, Your Honor.

23 **THE COURT:** Okay. Thank you.

24 And for the defense, Mr. Shapiro, you're leading off?

25 **MR. SHAPIRO:** Yes, Your Honor. Good morning, Andrew

1 Shapiro.

2 **THE COURT:** Good morning.

3 **MR. BROOME:** Good morning, Your Honor. Stephen

4 Broome, Quinn Emanuel, for Google.

5 **THE COURT:** Good morning.

6 **MS. MCCracken:** Good morning, Your Honor. Rachel

7 McCracken, Quinn Emanuel, for Google.

8 **THE COURT:** Good morning.

9 **MS. TREBICKA:** Good morning, Your Honor. Viola

10 Trebicka, Quinn Emanuel, for Google.

11 **THE COURT:** Good morning.

12 **MS. NIX-HINES:** Good morning, Your Honor. Crystal

13 Nix-Hines from Quinn Emanuel.

14 **THE COURT:** Ms. Nix-Hines, good morning. It's

15 probably been --

16 **MS. NIX-HINES:** It's my first appearance before you.

17 **THE COURT:** Yeah, but you are well-known to me.

18 **MS. NIX-HINES:** Uh oh.

19 **THE COURT:** You were a classmate of my husband, but --

20 **MS. NIX-HINES:** Who is that?

21 **THE COURT:** Matt Rogers.

22 **MS. NIX-HINES:** I had no idea. Send him my regards.

23 He' terrific.

24 **THE COURT:** I will.

25 He is. I agree. We've been married over 35 years.

1 **MS. NIX-HINES:** Wow.

2 **THE COURT:** Okay.

3 **MS. CRAWFORD:** Good morning, Your Honor. Jomaire

4 Crawford, Quinn Emanuel Urquhart Sullivan, for Google.

5 **THE COURT:** Okay. Good morning.

6 **MR. MARGOLIES:** Good morning, Your Honor. Joseph

7 Margolies from Quinn Emanuel for Google.

8 **THE COURT:** Okay. Good morning.

9 **MS. FANI:** Good morning, Your Honor. Teuta Fani from
10 Quinn Emanuel for Google.

11 **THE COURT:** Good morning.

12 Obviously lots of firepower on both sides and me and my
13 little team on this side.

14 Okay. We have a lot to do today. Who is leading on both
15 sides?

16 **MR. BOIES:** Your Honor, I will lead on our side,
17 although many other people will participate.

18 **THE COURT:** All right. Then stay at the microphone,
19 sir.

20 **MR. BROOME:** I think it depends on the issues,
21 Your Honor. We do have all of the different motions --

22 **THE COURT:** We will start with your trial readiness
23 binder. Motions will come later.

24 **MR. BROOME:** Okay. I believe that will be
25 Ms. McCracken.

1 **MR. BOIES:** Your Honor, before we commence with the
2 Court's schedule, could I take a moment to update the Court on
3 discussions that we had with plaintiffs' counsel yesterday?

4 **THE COURT:** With defense counsel?

5 **MR. BOIES:** That we had with defense counsel
6 yesterday.

7 **THE COURT:** Okay. Go ahead.

8 **MR. BOIES:** The Court is aware that we, rather
9 belatedly, made a motion for certification with respect to a C4
10 class. We informed counsel for Google last night that we are
11 withdrawing that motion. In light of that and in light of some
12 of the other developments in the case, including the difficulty
13 that we have had simplifying the case and dealing with the jury
14 instructions, we also informed Google that we were withdrawing
15 our demand for a jury trial.

16 **THE COURT:** So that's interesting. Do I have the
17 option of not allowing you to withdraw the jury demand?

18 **MR. BOIES:** Well, they -- they can keep me from
19 withdrawing the jury demand.

20 **THE COURT:** Are you keeping the jury demand?

21 **MR. SHAPIRO:** So, Your Honor, we only learned about
22 this yesterday afternoon, and we're still processing it, but we
23 like our chances with a jury and we like the jury system, so
24 this came kind of out of the blue to us. We welcome the
25 plaintiffs giving us a heads-up about it yesterday, but we

1 don't have a position yet.

2 And it's correct, that once a jury demand has been made,
3 the consent of the defendant is needed to withdraw it. So we
4 don't have a position on that yet, Your Honor. We have a lot
5 of jury instructions and verdict forms and everything we've
6 been working on, of course.

7 **THE COURT:** Well, we do, and my -- you know, good or
8 bad, I write too much when I have to do a bench trial, and with
9 a jury trial, I don't have to write so much. The jury just
10 gets to decide.

11 **MR. BOIES:** Right.

12 **THE COURT:** And the Ninth Circuit or most circuits
13 don't -- do not -- I think most circuits give jury verdicts a
14 bit more deference than they give district judges.

15 **MR. BOIES:** Your Honor, I would say that if -- if the
16 Court -- we realize that we're making this decision late. If
17 the Court would since prefer us not to do that, I think we
18 would not withdraw our jury demand.

19 We don't intend by this to put anybody out. The defendant
20 had previously said that they thought it ought to be a bench
21 trial. We thought by waiving the jury trial, it would expedite
22 things, but --

23 **THE COURT:** Well, I mean --

24 **MR. BOIES:** -- we're prepared to go either way.

25 **THE COURT:** There are pros and cons, obviously. I

1 tell law clerks that -- they all want trials, and I understand
2 why law clerks want trials, but I tell them it is the gift that
3 keeps on giving because as soon as the verdict comes in, we get
4 post-trial motions, and so for a trial judge, it's kind of
5 anticlimactic because it's just the next phase of briefing
6 after a jury verdict.

7 On the other hand, it's done. And I, you know, frequently
8 believe that it's my job to protect jury verdicts because I
9 believe they generally get it right. So unless they get it
10 incredibly wrong, then, you know, I -- I leave jury verdicts
11 alone.

12 So, anyway, I'll have to think about it. Obviously if
13 Google doesn't have a position yet, in any event, then the jury
14 trial will proceed as planned.

15 **MR. SHAPIRO:** And, Your Honor, just to make sure we
16 have a clear record, I think what Mr. Boies was referring to
17 when he said we believed that it should be a bench trial was
18 there were some initial questions about whether the injunctive
19 relief questions are questions for a judge.

20 **THE COURT:** Well, they are.

21 **MR. SHAPIRO:** Yes.

22 **THE COURT:** Injunctive relief is -- and that comes up
23 in the context of a number of the motions that you have
24 provided.

25 **MR. SHAPIRO:** Exactly.

1 **THE COURT:** And it also comes up in the context -- and
2 perhaps we'll get there at the end of the day. It also comes
3 up in the context of what gets presented to the jury because I
4 have frequently bifurcated so that material that doesn't need
5 to go to the jury doesn't go to the jury.

6 On the other hand, in this kind of case, especially, it's
7 important for the -- for the public to understand what the
8 allegations are, for the jury to be involved in what they
9 believe is the right answer with respect to that. And I can
10 always, as I have in other kinds of cases, get, you know,
11 preliminary findings by jurors, which then I can accept or not
12 accept for purposes of injunctive relief.

13 So there are lots of different ways to slice the issues.
14 But this is -- this is new information for me. Okay.

15 **MR. SHAPIRO:** That's all we've got, Your Honor.
16 Thanks.

17 **THE COURT:** So then with respect to the motion to
18 certify class, Docket 894, that's deemed withdrawn. That
19 docket gavel is terminated. And as in poker, I won't tell you
20 what I was going to do.

21 Okay. So let's go through your issues beginning with book
22 1 of 4. I received -- I'm at tab 2, your trial stipulations.
23 I received the updated versions of those, so this is now the
24 new version of this at Docket 1069, filed last night. Okay.
25 So your agreed-upon.

1 Why don't we have for the record whoever is going to
2 address Docket 1069.

3 **MR. BOIES:** Mr. Lee is going to address that,
4 Your Honor.

5 **THE COURT:** Mr --

6 **MS. MCCrackEN:** I will be addressing that for Google,
7 Your Honor. Rachel McCracken.

8 **THE COURT:** Okay. Agreed-upon stipulations 1 through
9 6 are acceptable.

10 With respect to No. 7, the way I do -- and I'm not exactly
11 sure what you mean here.

12 When you all play deposition designations in the
13 courtroom, agreed upon with each side's designations, and it
14 lasts five minutes, ten minutes, whatever it lasts, the court
15 reporter is relieved of her obligations to transcribe those, so
16 No. 7 is not accepted.

17 What you will be required to do is by the end of the day
18 lodge with the court reporter the transcript portions which
19 were played. Those will get attached to the transcript. She
20 will transcribe any deposition testimony that is used for
21 purposes of cross-examination, little short things, but she
22 won't sit there and transcribe while you're playing all these
23 designations.

24 Do you understand?

25 **MR. LEE:** Yes, Your Honor.

1 **MS. MCCracken:** Yes, Your Honor.

2 **THE COURT:** Numbers 8 through 11 are also acceptable.

3 With respect to the disputes, No. 13, I'm going to hold on
4 13. Frankly, I don't know if I can trust you yet. No offense.
5 But I've never had you as trial lawyers. And I'll know closer
6 to the end of trial whether I trust you.

7 I can tell you that I've had a case -- in general, look,
8 this is an adversarial system. I would tend to agree with
9 plaintiffs' proposal except that I had an antitrust class
10 action trial where the exchange happened, and I was somewhat
11 outraged at what the plaintiffs thought they could argue, given
12 the evidence that was presented in the case, and so based upon
13 the objections and what I saw in their slide presentation, I
14 bifurcated the argument because I no longer trusted them.

15 So hopefully we'll get to a point where I trust you, and
16 if I do, then you don't have to exchange.

17 **MR. LEE:** We hope to win your trust, Your Honor.

18 Thank you.

19 **THE COURT:** With respect to No. 14, I expect that most
20 of plaintiffs' case -- well, again, in general, this is an
21 adversarial system. Where are these witnesses? Are they
22 local? Are they not local?

23 **MR. LEE:** So, Your Honor, there are -- there are many
24 local witnesses. There are also a handful of witnesses that
25 are not local.

1 I think -- here's the problem, is that plaintiffs have a
2 handful of Google witnesses that we intend to put on the stand
3 for a very limited purpose, for a very short amount of time. A
4 lot of times it's just to establish foundation or get a couple
5 documents in, but looking at their witness list and their
6 estimated time for some of these witnesses, what Google intends
7 to do is, you know, we put on somebody for 10 minutes, they're
8 going to put them on for 45 minutes, an hour, essentially
9 putting their case in our case in chief.

10 So --

11 **THE COURT:** A response.

12 **MS. MCCracken:** Your Honor, we think it's important
13 that each witness testify once in a complete form. We --

14 **THE COURT:** You understand this is an adversarial
15 system.

16 **MS. MCCracken:** We do, Your Honor.

17 **THE COURT:** And that you can't co-opt the plaintiffs'
18 case.

19 **MS. MCCracken:** That is not our intention, Your Honor.

20 **THE COURT:** Look, every morning if you can't figure it
21 out -- I'm not accepting either one. Well, I guess it would be
22 plaintiffs' at this point.

23 It is my belief that we shouldn't have to have witnesses
24 come back multiple times for no good reason. So understand
25 that, and, again, that all goes as to trust.

1 I have to tell you, given the level of disputes I've seen,
2 I do not trust you. I don't. You fight about everything, and
3 you fight about dumb things.

4 So as a general rule, I like the -- I like the witnesses
5 to testify just once, and I think it's helpful for the jury,
6 but that doesn't mean that the defendant can co-opt the
7 plaintiffs' case.

8 So --

9 **MS. MCCRACKEN:** Your Honor, I would like to assure you
10 that is not our intention. The reason our estimates are a bit
11 longer than the plaintiffs' are plaintiffs intend to just
12 authenticate a document and then Google needs to have testimony
13 on the document to put it in context, which --

14 **THE COURT:** No. That would not be allowed. If they
15 get a document in, you can explain it later.

16 And why do we have a witness on the stand for
17 authentication purposes?

18 **MS. MCCRACKEN:** We would --

19 **THE COURT:** Why wouldn't you stipulate to
20 authentication?

21 **MS. MCCRACKEN:** Your Honor, we do have a stipulation
22 as to authenticity and certain evidentiary issues, but there
23 are objections pending to other documents that would need to be
24 resolved in advance.

25 We also believe --

1 **THE COURT:** Give me an example.

2 **MS. MCCRACKEN:** So if you look at the statement that
3 plaintiffs submitted as part of the pretrial --

4 **THE COURT:** And, understand -- if I look at the
5 statement -- you understand that I have four three-inch binders
6 so what are you talking about?

7 **MS. MCCRACKEN:** So a number of excerpts of documents
8 are taken out of context and mischaracterized, and what it
9 appears plaintiffs intend to do, if we stipulate that they're
10 admissible for all purposes, is introduce those arguments
11 through attorney argument without any sponsoring witness or any
12 testimony --

13 **THE COURT:** Okay. How -- how many -- I know --
14 Mr. Boies, you don't have to raise your hand.

15 How many attorneys here have tried more than five cases?

16 All right. In this courtroom, you do not get to put on --
17 throw in documents and evidence and not present it to a jury
18 and then argue it later. That's not how it works. We aren't
19 going to have hordes of evidence in here that the jury has
20 never seen or heard and then sprung on them at closing.

21 **MR. LEE:** Understood, Your Honor.

22 **MS. MCCRACKEN:** Thank you, Your Honor. Understood.

23 **THE COURT:** Okay. So now what's the issue?

24 **MS. MCCRACKEN:** I think with that guidance from the
25 Court, we can negotiate further with plaintiffs, and we may be

1 able to make significant progress.

2 **THE COURT:** Terrific.

3 Why would I allow you to call third-party witnesses out of
4 order?

5 **MS. MCCRACKEN:** Your Honor, a number of third-party
6 witnesses have other jobs currently and other responsibilities
7 and we just can't guarantee that for the full --

8 **THE COURT:** So why can't you work together?

9 **MR. LEE:** We tried, Your Honor. We asked Google who
10 are these third parties that might have scheduling --

11 **THE COURT:** Yeah. Exactly.

12 **MR. LEE:** And they didn't identify any. So for us,
13 it's sort of a hypothetical problem.

14 **MS. MCCRACKEN:** We did make it clear that the
15 witnesses we're speaking about are the third-party employees --

16 **THE COURT:** The answer is no. You can call them in
17 any order you want in your case in chief but not in theirs.
18 And if you need to do it in theirs, you need to work with the
19 other side. Back to my point. Not trustable yet.

20 **MS. MCCRACKEN:** Yes, Your Honor. We will endeavor to
21 earn your trust.

22 **THE COURT:** And if you need my help because you really
23 have someone who has no ability to otherwise get here and
24 plaintiffs aren't being professional about it, then raise it
25 with me, and I will help you.

1 **MS. MCCRACKEN:** Thank you, Your Honor.

2 **THE COURT:** But you can't co-opt their case.

3 **MS. MCCRACKEN:** That's not our intention, Your Honor.
4 Our intention was just to give the Court advance notice that --

5 **THE COURT:** Well, this says advance notice, and that
6 is not what you were suggesting. What you were suggesting is
7 that you should be able to do it whenever you want. That's
8 what this says. Each party -- "either party may call
9 third-party witnesses out of order, if necessary, to
10 accommodate the schedules of third parties, including Google
11 calling witnesses during plaintiffs' case in chief." That's
12 not acceptable.

13 **MS. MCCRACKEN:** Okay, Your Honor. With your guidance,
14 we will work with plaintiffs and find a way --

15 **THE COURT:** Working together is the key to this
16 conference. If there is one takeaway that you shall all take
17 away, it is that you better start working together better
18 because you are not.

19 With respect to deposition testimony, so your No. 16,
20 plaintiffs' approach is -- is the appropriate approach. Why
21 they're not appearing at trial is not relevant at all.

22 I don't want there to be any sympathy, *Oh, I can't, I'm at*
23 *someone's graduation or my daughter is this* or -- no. If they
24 can't make it, they can't make it. We have a process. That
25 process is being used. There will be no indication as to why

1 they're not here.

2 18, plaintiffs' approach is appropriate. This is an
3 adversarial process.

4 **MS. MCCracken:** Your Honor, we respectfully request
5 that if there's not advance disclosure, we be permitted to
6 object before certain exhibits are introduced to a witness
7 outside the presence of the jury.

8 **THE COURT:** Denied. You should be able to get -- so,
9 let's see. Let's look at this a little more closely.

10 "Plaintiff agrees to the exchange schedule and framework
11 set forth below." So take me to the line.

12 Mr. Lee, so what part are you agreeing to here?

13 **MR. LEE:** Judge, we agree to all of it, except that it
14 should not apply to cross-examinations or examinations of
15 adverse witnesses. So the process is fine. We just don't
16 think it -- as you said, it's an adversarial system --

17 **THE COURT:** You need to have, though, with respect --
18 I totally agree with cross-examine. You give them the binder
19 right before you start cross-examining them, and that's fine.

20 With respect to the directs, I mean, most of your -- most
21 of your witnesses are adverse.

22 **MR. LEE:** That's the issue, Judge, is that I think
23 we're going to call a lot of Google witnesses, and they will be
24 adverse, so it's effectively a cross-examination for each of
25 them. And, you know, we're going to have a lot more of these

1 types of witnesses than Google, so it's not really a
2 goose/gander issue because --

3 **THE COURT:** I understand.

4 **MR. LEE:** Yep.

5 **THE COURT:** Have the exhibits to them for the day's
6 proceedings by 7:00 a.m.

7 **MR. LEE:** That's for the adverse witnesses, right,
8 Your Honor?

9 **THE COURT:** Correct.

10 **MR. LEE:** Thank you.

11 **THE COURT:** Anything that is so shockingly bad, you
12 can raise it at 8:00.

13 **MS. MCCracken:** Thank you, Your Honor.

14 **THE COURT:** No. 9 -- or No. 20, Google's proposal is
15 the appropriate one. So I'm not going to have any argument in
16 the morning about the rule of completeness and switching up the
17 testimony. It's a waste of time. So if anybody thinks that
18 the jury is going to remember the exact way in which something
19 was read two weeks or so after the evidence is presented,
20 you're wrong. They barely remember what happened the prior
21 day.

22 **MS. MCCracken:** Your Honor, may I raise one additional
23 issue on deposition designations that came to light during
24 discussions yesterday?

25 **THE COURT:** You may.

1 **MS. MCCracken:** Plaintiffs have taken the position
2 that they can play the deposition designations, not for
3 impeachment, but simply for their case in chief of witnesses
4 who will appear live at trial. And we would like some guidance
5 because Google's understanding is if a witness appears live --

6 **THE COURT:** There is a rule on this.

7 **MS. MCCracken:** That is our understanding, Your Honor.

8 **THE COURT:** There is a rule on this. You're not
9 allowed to do that, I don't think.

10 **MR. LEE:** I thought that, too, Your Honor, but there
11 actually was a rule that allows it.

12 **THE COURT:** What's the number.

13 **MS. BONN:** Amanda Bonn for plaintiffs, Your Honor.

14 I think the issue is under Federal Rule of Civil Procedure
15 32(a)(2) and (3). There's --

16 **THE COURT:** Hold on.

17 **MS. BONN:** Excuse me. Sorry.

18 **THE COURT:** Let's hold on this one. I'm missing my --
19 I'm missing my book. I tried my last case in San Francisco and
20 I must have left it in chambers.

21 The rule number again?

22 **MS. BONN:** FRCP 32(a)(2) and (3). And specifically
23 this comes up in the context of 30(b)(6) depositions. Google
24 has taken the position that if they intend to call a 30(b)(6)
25 deponent that we took live in their case, we can't play the

1 30(b)(6) for any purpose in ours --

2 **THE COURT:** That's different.

3 **MS. BONN:** Yes.

4 **THE COURT:** Those are admissions.

5 **MS. BONN:** Correct.

6 **THE COURT:** So admissions can be played.

7 **MS. MCCracken:** We were not previously told that they
8 were intending to play only the Rule 30(b)(6) designations. If
9 that's the limitation and plaintiffs are willing to disclose
10 the designations so we can confirm it was the 30(b)(6) portion,
11 I think the parties may be able to resolve this without
12 burdening the Court.

13 **MS. BONN:** To be clear I didn't say "only." So that's
14 issue number one --

15 **THE COURT:** So admissions can be played. Party
16 admissions can be played, whether or not the person is here.
17 They could have a witness on the stand and play it anyway.
18 That's what -- that's what the rule allows.

19 So there may or may not be an issue. I mean, you have
20 to -- if you're going to play something, you needed to already
21 disclose the deposition designations. That should have already
22 happened.

23 **MS. BONN:** It has, Your Honor.

24 **MS. MCCracken:** I think the issue is we were unaware
25 that they were planning to play designations for witnesses that

1 were live, so we haven't been told which witnesses they're
2 taking the position would be by designation as opposed to live.

3 **THE COURT:** Okay.

4 **MS. MCCracken:** If they do that, we can look.

5 **THE COURT:** There's no issue in front of me right now.
6 The rule says that they can do it and they can play the
7 admissions. If you have a real issue, let me know later.

8 **MS. MCCracken:** I believe Ms. Bonn was about to
9 address the -- the other piece, which --

10 **MS. BONN:** There's two other issues, Your Honor. One
11 is that there are certain witnesses that are outside the
12 jurisdiction unavailable, and Google has said, *Well, in our*
13 *case, we intend to call them. Therefore you can't play their*
14 *deposition in your case.* So that's Issue No. 2.

15 **THE COURT:** If they do not show up -- again, I need to
16 know who the witnesses are. If they do not show up in the
17 plaintiffs' case, then they can play them.

18 **MS. MCCracken:** We will bring the witnesses live.
19 We've indicated they will be here live in our case.

20 **THE COURT:** Well, then, you don't meet the
21 requirements of the rule, then they are no longer unavailable.

22 **MS. BONN:** Correct, Your Honor. If they've got them
23 sitting here and they're under subpoena and they're ready to
24 get on the stand, that's fine.

25 **THE COURT:** Have you issued trial subpoenas?

1 **MS. BONN:** Not yet.

2 **THE COURT:** Well, I suggest you do.

3 **MS. BONN:** Yes.

4 **THE COURT:** What next?

5 **MS. BONN:** That's it, Your Honor.

6 **THE COURT:** Okay.

7 **MS. BONN:** Thank you.

8 **THE COURT:** Work together. That's the motto for
9 today.

10 **MR. LEE:** Thank you, Your Honor.

11 **THE COURT:** Okay. Witness list. My estimate is --
12 who is doing witnesses?

13 **MS. MCCracken:** I will be handling it for Google,
14 Your Honor.

15 **THE COURT:** All right. Ms. McCracken; right?

16 **MS. MCCracken:** Yes, Your Honor.

17 **THE COURT:** Mr. Boies?

18 **MR. BOIES:** Yes, Your Honor.

19 **THE COURT:** All right. My back of the envelope
20 indicates that plaintiff is asking for about 11 hours of fact
21 testimony, another 10 of experts for a total of 20 hours, and
22 the defendants are asking for approximately 16 hours; right?

23 **MR. BOIES:** Yes, Your Honor.

24 **MS. MCCracken:** That's very close to our numbers as
25 well, Your Honor.

1 **THE COURT:** You have eight trial days. Trial day
2 equals four and a half hours. That's eight trial days total.
3 And that means four and a half hours times four days is 18
4 hours, and that's -- so you each get 18 hours, and that
5 includes openings and closings, not *voir dire*.

6 So on a daily basis, you will get time sheets, and your
7 time sheets will tell you how much time is left.

8 How much time do you want to reserve for closing?

9 **MR. BOIES:** I would think, you know, subject to being
10 somewhat consistent with the defendants, about 45 minutes,
11 Your Honor.

12 **MS. MCCracken:** We would estimate about 60 minutes,
13 Your Honor.

14 **THE COURT:** Okay. That will be on the time sheet so
15 that you don't run out.

16 Very early on I had a party that ran out, so now I just
17 put it in the time sheet so you don't misread it.

18 Okay. With respect to the witnesses then, we expect that
19 they will be here live: Messrs Brown, Byatt, Castillo, Davis,
20 Castillo and McClelland.

21 **MR. BOIES:** Yes, Your Honor.

22 **THE COURT:** So all of the -- Felt, Fair and Kleber or
23 no?

24 **MR. BOIES:** I'm sorry, Your Honor?

25 **MS. MCCracken:** Ms. Felt and Mr. Fair will appear

1 live, Your Honor.

2 **THE COURT:** So Davis and Trujillo, those are the ends
3 of the individual plaintiffs. All of those will be here live.

4 McClelland, do we have an indication yet? Live? Is he
5 coming live?

6 **MR. MAO:** We don't know yet, Your Honor. We are
7 endeavoring. It's a former Google employee that lives abroad.

8 **THE COURT:** And you have deposition transcripts, in
9 any event?

10 **MR. MAO:** We do. Since the last dispute, Your Honor.

11 **THE COURT:** He's a former employee?

12 **MR. MAO:** Yes, Your Honor.

13 **THE COURT:** So what is -- all right. So Google
14 doesn't have any control over him.

15 How about Mardini?

16 **MS. MCCracken:** Mr. Mardini will appear live,
17 Your Honor.

18 **THE COURT:** And he will appear live in plaintiffs'
19 case?

20 **MS. MCCracken:** Yes, Your Honor.

21 **THE COURT:** Where is he located?

22 **MS. MCCracken:** Mr. Mardini is based in France.

23 **THE COURT:** Felt?

24 **MS. MCCracken:** Ms. Felt will also appear live, and
25 she's based in the Bay Area.

1 **THE COURT:** Okay. Fair? He's a former. What's the
2 plan with Fair?

3 **MS. MCCRACKEN:** We expect that Mr. Fair will appear
4 live, but he's a former with a new employer, so we will need to
5 work with plaintiffs to give adequate notice to Mr. Fair so he
6 can arrange for time off of work.

7 **THE COURT:** Okay. And Kleber?

8 **MS. MCCRACKEN:** Mr. Kleber we expect will appear live.

9 **THE COURT:** And he's in Massachusetts?

10 **MS. MCCRACKEN:** Yes, Your Honor.

11 **THE COURT:** Berntson?

12 **MS. MCCRACKEN:** We expect Mr. Berntson will also
13 appear live, and he's based in New York.

14 **THE COURT:** Sadowski?

15 **MS. MCCRACKEN:** We expect Ms. Sadowski will appear
16 live as well, and she's based in the Bay Area.

17 **THE COURT:** Walker?

18 **MS. MCCRACKEN:** Mr. Walker is now a former Google
19 employee, but we expect that he will appear live, and he is
20 based in Los Angeles.

21 **THE COURT:** Palmer?

22 **MS. MCCRACKEN:** We expect that Mr. Palmer will appear
23 live, although...

24 **THE COURT:** Is he current -- still current?

25 **MS. MCCRACKEN:** He's not currently a Google employee.

1 **THE COURT:** So he's former?

2 **MS. MCCracken:** Yes, Your Honor.

3 **THE COURT:** Is he still in the Bay Area?

4 **MS. MCCracken:** I'm not certain, Your Honor. Let me
5 see if one of my colleagues has confirmation.

6 We believe he's still in the Bay Area.

7 **THE COURT:** Tabriz?

8 **MS. MCCracken:** We expect Ms. Tabriz will appear live,
9 and she's based in the Bay Area.

10 **THE COURT:** Borsay?

11 **MS. MCCracken:** Ms. Borsay is one of the witnesses
12 where we do have a dispute. Ms. Borsay is based in Germany and
13 is a German citizen, and we do not expect her to appear live.

14 **MR. LEE:** Your Honor, may I be heard on Ms. Borsay,
15 please?

16 **THE COURT:** Who -- who --

17 **MR. BOIES:** Mr. Lee.

18 **THE COURT:** Okay. Go ahead.

19 **MR. LEE:** The issue with Ms. Borsay is she is the
20 former head of Chrome Privacy and managed Incognito Mode.

21 **THE COURT:** Right. That will be very interesting to
22 the jury, I think, that Ms. Borsay is a Google employee,
23 managed the technology at issue, and Google chooses not to
24 bring her.

25 **MR. LEE:** Right. I think we'd prefer to cross-examine

1 her live. She's a managing agent and --

2 **THE COURT:** There's -- under what rule can I force her
3 to show up?

4 **MR. LEE:** If she's a current employee and is
5 considered a managing agent of the company, the company can be
6 compelled to bring her live, whether she's outside the
7 jurisdiction or not.

8 **THE COURT:** All right.

9 Response.

10 **MS. MCCracken:** We don't believe Ms. Borsay qualifies
11 as a managing agent.

12 **THE COURT:** Okay. Somebody start a list. This issue
13 will be briefed. Unless otherwise authorized, no brief shall
14 exceed three pages.

15 Sometimes -- I looked at the jury instructions and
16 realized that I now have to put in my standing order what the
17 definition of "brief" is given that it's clear that neither
18 side understands what the term "brief" means. "Brief" does not
19 mean 10 pages on one instruction.

20 **MR. LEE:** Three pages will do it, Judge.

21 **THE COURT:** Okay. Twohill?

22 **MS. MCCracken:** Ms. Twohill will appear live, and
23 she's based in the Bay Area.

24 **THE COURT:** Lemoine or Lemoine?

25 **MS. MCCracken:** Mr. Lemoine is not a current Google

1 employee, and there's a motion pending on Mr. Lemoine.

2 **THE COURT:** Oh, this is -- yeah. Okay. We'll deal
3 with him later.

4 Rakowski?

5 **MS. MCCracken:** We expect Mr. Rakowski to appear live.
6 He's a current employee in the Bay Area.

7 **THE COURT:** Halavati?

8 **MS. MCCracken:** Mr. Halavati will not appear live. He
9 is a resident of Germany and not a just citizen.

10 **MR. LEE:** The issue with Mr. Halavati, Your Honor,
11 he's not a managing agent. We agree with that. We're not
12 requesting he appear live, but we are requesting he appear by
13 Zoom.

14 Germany does not allow witnesses to testify by Zoom. When
15 this issue came up during fact discovery, during depositions,
16 Judge van Keulen ordered a handful of the German Google
17 employees to drive over to Switzerland and have their testimony
18 taken via Zoom there.

19 So that's something that we're willing to do, and we think
20 that makes the most sense.

21 **MS. MCCracken:** Your Honor, we don't think Federal
22 Rule of Civil Procedure 45 allows for a trial subpoena to a
23 non-U.S. citizen based outside of the country.

24 **MR. BOIES:** We agree with that, Your Honor. I don't
25 think we can -- I don't think the -- the Rule 45 contemplates

1 at this point Zoom depositions. The technology has advanced
2 considerably since the rule was amended.

3 I do think it is within the discretion of the Court, but
4 it would be a -- it is something as to which I don't know of
5 any precedent for.

6 **THE COURT:** Do we have his deposition?

7 **MS. MCCRACKEN:** Yes, Your Honor.

8 **MR. BOIES:** Yes, we do, Your Honor.

9 **THE COURT:** What's wrong with the deposition?

10 **MR. BOIES:** I'm sorry, Your Honor?

11 **THE COURT:** What's wrong with just doing deposition
12 testimony?

13 **MR. BOIES:** We think it would be better for the
14 jury --

15 **THE COURT:** Well, it's always better.

16 **MR. BOIES:** We can deal with it. We can deal with the
17 deposition, Your Honor.

18 **THE COURT:** Do you want to brief this or not?

19 **MR. BOIES:** No, Your Honor. We're -- we have got
20 enough things that we're burdening the Court with.

21 **THE COURT:** Shelton.

22 **MS. MCCRACKEN:** We expect that Mr. Shelton will appear
23 live.

24 **THE COURT:** Adhya.

25 **MS. MCCRACKEN:** Mr. Adhya will be on parental leave

1 during trial, Your Honor, so we've asked plaintiffs to submit
2 deposition designations, and they have done so for Mr. Adhya.

3 **THE COURT:** Okay.

4 **MR. LEE:** Mr. Adhya lives in the Bay Area. I actually
5 didn't know he was going on parental leave. I thought he was
6 going on vacation. If it's parental leave, then I think he's
7 unavailable, and we'll use his deposition.

8 **MS. MCCracken:** Thank you.

9 And we disclosed that in our footnote, but it may have
10 been lost, but thank you for your consideration of Mr. Adhya.

11 **THE COURT:** One other thing before it gets lost.

12 On your depo designations, any time you have deposition
13 designations where you're just playing the video or where
14 you're playing video, at the beginning of the day, I need to
15 know how much time is being allocated for each side with
16 respect to the runtime. Okay? I'll explain my clock to you
17 before we're done, but it is important that you make sure to do
18 that.

19 **MS. MCCracken:** Would Your Honor like that by
20 7:00 a.m. each day or at the beginning of the court day.

21 **THE COURT:** No. When you get here, you just hand it
22 to Mr. Cuenco, and he'll give it to me.

23 **MS. MCCracken:** Thank you, Your Honor.

24 **THE COURT:** Okay. Jesse Adkins?

25 **MS. MCCracken:** He's expected to appear by deposition.

1 **THE COURT:** Chung?

2 **MS. MCCRACKEN:** Mr. Chung is also expected to appear
3 by deposition.

4 **THE COURT:** Leung or Leung? Leung, Bert?

5 **MS. MCCRACKEN:** Mr. Leung is expected to appear live,
6 and there is a dispute identified in the footnotes as to
7 Mr. Leung.

8 Plaintiffs' position is that they are allowed to examine
9 Mr. Leung and Google is not allowed to cross-examine Mr. Leung
10 due to a sanctions order in this case, and that's addressed in
11 Footnotes 4 and 5 of Docket 1049.

12 **THE COURT:** Okay.

13 This is insufficient briefing. I have no idea what you're
14 talking about, and I'm not going to go cross-check docket
15 numbers.

16 **MR. MAO:** We will brief that, Your Honor.

17 **THE COURT:** What's the issue?

18 **MR. MAO:** The issue is that the magistrate judge
19 ordered that Google be precluded from using this and the next
20 two witnesses from providing testimony for Google, but the
21 order was also clear that it not bar plaintiffs from being able
22 to use testimony, and the dispute is that Google believes that
23 they, notwithstanding the order, have the right to
24 cross-examine -- I'm sorry -- to redirect the witness.

25 **MS. MCCRACKEN:** Your Honor, the language of the order

1 says, quote, Google cannot offer or rely on testimony, end
2 quote, but does not address a scenario where plaintiffs make
3 the affirmative choice to call these witnesses.

4 The order is silent as to that scenario, and we believe
5 that Google has a due process right to cross-examine witnesses
6 should plaintiffs make the affirmative choice to offer evidence
7 from those witnesses.

8 **THE COURT:** It seems to me that Google's position,
9 just hearing what you've said right here, is probably right. I
10 don't -- it's -- it's -- I'll go back and read it.

11 You get three pages, and you collectively do them
12 together. I take it it's Leung, Liao, and Liu?

13 **MS. MCCracken:** Yes, Your Honor. They're hopefully in
14 order.

15 **THE COURT:** Actually, I don't need briefing. I'll ask
16 van Keulen and I'll read it myself and I'll let you know.
17 Okay.

18 **MR. MAO:** Your Honor, if I may, there is a nuance
19 there I want to just point out. I don't believe that Google's
20 position is that once we put on the witness, they are
21 limited -- they're limited to redirects.

22 **THE COURT:** Correct.

23 **MR. MAO:** Right.

24 **THE COURT:** And that's all -- that's all I would
25 expect; that is, only a redirect, not an affirmative

1 presentation. But what you're suggesting is that -- from what
2 I just heard is that they don't even get to redirect.

3 **MR. MAO:** I think there are some permutations there
4 that we could potentially work with, but I think they've taken
5 the opposite position which is that they can elicit anything
6 once we put on the witness.

7 **THE COURT:** I'm not so sure of that.

8 **MS. MCCracken:** Your Honor, our position is that we
9 are permitted to redirect the witness within the -- to address
10 plaintiffs' examination. We have not taken the position that
11 we could affirmatively call those witnesses in our case.

12 **MR. BOIES:** Your Honor, I think that they are entitled
13 to, in effect, cross-examine what we put on. I don't think
14 they're entitled to go beyond that.

15 **THE COURT:** Right. That's what I'm saying.

16 **MR. BOIES:** I think that's right.

17 **MS. MCCracken:** I think we may all be in agreement on
18 this.

19 **THE COURT:** Okay. Great. Agreement. That's what
20 we're working for. All right. Redirect only by Google.

21 Justin Schuh?

22 **MS. MCCracken:** I think our understanding is that
23 Mr. Schuh will appear by designation.

24 **THE COURT:** Okay.

25 **MR. MAO:** I'm sorry, Your Honor. Just point of

1 clarification, if you don't mind.

2 Is our understanding correct then -- it sounds like
3 Mr. Liao and Ms. Liu will be appearing live?

4 **MS. MCCracken:** Yes. Those witnesses will appear
5 live.

6 **MR. MAO:** Thank you. Sorry about that, Your Honor.

7 **THE COURT:** No worries.
8 Justin Schuh.

9 **MS. MCCracken:** We believe he will be appearing by
10 deposition.

11 **THE COURT:** Okay.
12 Deepti Bhatnagar?

13 **MS. MCCracken:** I'm afraid to attempt pronunciation on
14 that, but Mr. Bhatnagar -- Ms. Bhatnagar will be appearing by
15 deposition.

16 **THE COURT:** Okay. Ms. Bindra?

17 **MS. MCCracken:** Ms. Bindra will appear live.

18 **THE COURT:** Hopefully we will have no custodians.

19 **MS. MCCracken:** That is my sincere hope, Your Honor.

20 **THE COURT:** Steve Ganem?

21 **MS. MCCracken:** Mr. Ganem will appear live.

22 **THE COURT:** Bruce Schneier?

23 **MS. MCCracken:** Mr. Schneier will appear live.

24 **THE COURT:** Okay. So all the experts I expect are
25 going to appear live; right? Hochman, Keegan, Lasinski?

1 **MR. MAO:** Yes, Your Honor, for the plaintiffs.

2 **MS. MCCracken:** That's true for Google as well,
3 Your Honor.

4 **THE COURT:** And then Zervas?

5 **MS. MCCracken:** Psounis.

6 **THE COURT:** Psounis. Amir.

7 Do we still have issues with Amir?

8 **MS. MCCracken:** There is a *Daubert* pending on
9 Mr. Amir, Your Honor.

10 **THE COURT:** There was something resolved, I thought,
11 with respect to Amir at the last minute.

12 **MR. MAO:** I think some, and then I just want to point
13 out, Your Honor, on the prior list, there is also a limited
14 *Daubert* on Mr. Hochman as well -- Mr. Hochman as well. So I
15 think there are -- they may be motions that are in front of you
16 for today, I think.

17 **MS. MCCracken:** That's our understanding as well.

18 **THE COURT:** Strombom?

19 **MS. MCCracken:** Mr. Strombom will appear live.

20 **THE COURT:** And Schwartz?

21 **MS. MCCracken:** He will also appear live.

22 **THE COURT:** Okay. With respect to the next tab, the
23 combined exhibit list, why are you seeking to have this under
24 seal?

25 **MS. MCCracken:** Your Honor, Ms. Crawford will be

1 addressing the exhibit list for our side.

2 **MS. CRAWFORD:** Your Honor --

3 **MR. MCGEE:** Your Honor, Ryan McGee.

4 **THE COURT:** Appearances for Tab 4 exhibits.

5 **MR. MCGEE:** Your Honor, this is Ryan McGee from Morgan
6 and Morgan for the plaintiffs. I will be addressing the
7 exhibit list and --

8 **THE COURT:** And I need who on the defense side?

9 **MS. CRAWFORD:** Jomaire Crawford, Your Honor.

10 **THE COURT:** Okay. Ms. Crawford.

11 **MR. MCGEE:** Your Honor, I'll let Google address why
12 they believe it should be under seal.

13 **MS. CRAWFORD:** My understanding, Your Honor, is
14 portions of the exhibit list are to be filed under seal,
15 including because there are descriptions for some of the
16 documents appearing on the exhibit list that have been sealed
17 to date, sensitive information and other identifiers.

18 **THE COURT:** So you are all going to have to figure out
19 how you're going to try this case without me sealing this
20 courtroom because I don't seal courtrooms in a public setting.

21 First of all, I can't read your exhibit list. The font is
22 too small. Second, you have Bates numbers, so there is zero
23 reason to have a description that contains something -- I mean,
24 I don't -- I don't know why you have to have it in there to
25 begin with. Why do you need it in there?

1 **MS. CRAWFORD:** We're happy to modify the list
2 consistent with that guidance, Your Honor, in order to
3 eliminate the likelihood of having to seal the exhibit list.
4 So we'll go back through the list with an eye toward making
5 those changes.

6 **MR. MCGEE:** Agreed, Your Honor.

7 **THE COURT:** The other thing you're going to do is
8 you're going to get -- you can keep this internally. I
9 understand why you would want it internally. I want one that I
10 can read because I actually look at the exhibit list during
11 trial, and I track things during trial. Little things that we
12 judges sometimes do.

13 So I don't need the Bates number. Delete it from the
14 public version. Delete anything in the description that you
15 want sealed. I don't need a sponsoring witness.

16 In this Docket 1054, there is not a single -- well, I take
17 that back. Five stipulations to admit? Maybe a few more. Why
18 aren't there more stipulations to admit?

19 Actually, let's talk about time. Here's the way time
20 works. This is the reason why you need to stipulate. Time
21 will be limited. Maybe what I'll do is I'll limit it even more
22 to give you more of an incentive to stipulate to exhibits.

23 The clock is always running. I get four and a half hours
24 of trial time every day. We start at 8:30 promptly. So if you
25 need to go to the bathroom, do it before. I start with you at

1 8:00 a.m. promptly. If you need to go to the bathroom, do you
2 it before.

3 The jury comes in at 8:30, and at 8:30, the clock starts
4 ticking, and we start -- let's say plaintiffs go first. Four
5 and a half hours. You are deducted four and a half hours minus
6 any amount of time that the other side uses.

7 When we get to their case in chief, then it flips, and the
8 clock starts, and they get deducted four and a half hours less
9 any time that you use.

10 So while your witnesses are sauntering in from the
11 attorney lounge to the courtroom and you say, "Sorry, Judge," I
12 say, "Well, that's fine. Clock's ticking." It's on you, not
13 on me and not on the jury.

14 So if you have to spend precious time laying the
15 foundation for your exhibits, then the jury's not going to get
16 to the substance of the case, and you're going to run out of
17 time. That's why you should be stipulating, because I can --
18 look. You can give me the -- you can give me the binders in
19 advance, and you've got 15 exhibits for this witness. "Judge,
20 we've looked at it. We've all stipulated." And that's great.
21 You reference the exhibit. We just keep rolling. There is no
22 interruption. I just note it's stipulated. Admitted. We're
23 good to go.

24 If not, then you -- then you have to go through the whole
25 process of laying the foundation.

1 If there is an objection and you lose the objection, the
2 time is allocated against the losing party. Minimum, one
3 minute.

4 So, you need to be working on these stipulations.

5 Now, it could be that you want to do it the day of.
6 That's fine. I don't care. But you really should work
7 together because it is a waste of trial time to do some of
8 these things.

9 **MR. MCGEE:** And, Your Honor, if you will recall, the
10 Court referred the discovery disputes to a special master, and
11 we selected Special Master -- the retired Judge Laporte.

12 Yesterday, I believe, Google was able to execute or
13 counter-execute the retainer agreement for Judge Laporte. I
14 think it had been sent two or three months ago, and we had done
15 that. I think they had some accounting issues, so I believe
16 that it will get started with Judge Laporte, and we'll be able
17 to resolve a lot of these objections through that process.

18 But that's kind of where that stands right now. And
19 that's why I don't think there's any more movement for
20 Your Honor.

21 And then some of the reasons that we're not stipulating,
22 subject to a couple of motions in limine, including Google's --
23 when they moved for summary judgment on the contract and took
24 the unambiguous position. So we contend that much of their
25 exhibit list includes impermissibly -- or -- excuse me --

1 impermissible evidence.

2 **THE COURT:** Okay.

3 I also don't need on the revised list to be filed. I have
4 this one. So I don't need it again, either side's objections.

5 What do you mean by "expert identification"?

6 **MR. MCGEE:** Your Honor, I believe with that, it was we
7 identified it. I believe we had gone through your standing
8 order, and for expert identification, it would be something
9 that the expert may refer to but we would not seek to introduce
10 it into evidence. So, for example, a treatise, an economics
11 book, things of that nature.

12 **THE COURT:** Okay. But you're not offering those into
13 evidence?

14 **MR. MCGEE:** If they're marked for identification, I
15 don't believe so.

16 **MS. CRAWFORD:** That's right.

17 **THE COURT:** I don't need that column either.

18 All right. So what I need -- so what you'll keep is the
19 prefix, the exhibit number, the description modified to only
20 have information that is public, the stipulation to admit,
21 injunction phase, and date admitted. Okay?

22 You will be required at the close of evidence on the last
23 day to submit to the Court a list of all exhibits that have
24 been admitted with the description. That helps the jury wade
25 through all of the evidence. So somebody should be doing that

1 on a daily basis, and you should be checking with each other in
2 terms of making sure that we're all on the same page in terms
3 of admitted exhibits.

4 Any questions?

5 **MR. MCGEE:** Not presently, Judge.

6 **MS. CRAWFORD:** Not from that point, Your Honor.

7 Would you like for us to make the changes that you've just
8 outlined and file a corrected version of the exhibit list, or
9 should we wait until the process with Special Master Laporte
10 plays out, which I expect will yield further compromises and
11 resolutions of some of the open exhibit list disputes?

12 **THE COURT:** That's fine. January 5th.

13 **MS. CRAWFORD:** Thank you, Your Honor.

14 **THE COURT:** Okay. Tab 5, she's resolving your -- your
15 deposition designations?

16 **MR. MCGEE:** Per Your Honor's order, yes.

17 **MS. CRAWFORD:** She is.

18 **THE COURT:** Perfect. Okay.

19 We're not going to talk about jury instructions right this
20 minute.

21 I need a proposed statement of the case that is neutral
22 and that is short. Half a page. That is all I want.

23 Who is going to be in charge of negotiating half a page to
24 give me?

25 **MS. MCCracken:** I can do that, Your Honor.

1 **THE COURT:** Who can work with Ms. McCracken?

2 **MS. BONN:** I can, Your Honor, Amanda Bonn.

3 **THE COURT:** All right. I want half a page by
4 tomorrow. That's all I want. I just need to let the jury know
5 what kind of case this is. It's not a sex crime case, it's not
6 a murder, it's not a guns and drugs. It's just a civil case
7 over something that happens on Google. That's all I want them
8 to know. All right. They don't need me to go on for pages.
9 Half a page by tomorrow.

10 **MS. CRAWFORD:** Yes, Your Honor.

11 **THE COURT:** Thank you.

12 We are allowed -- we use a SurveyMonkey now, so I'm at Tab
13 10. Who is doing Tab 10?

14 **MS. MCCRACKEN:** I will be doing tab 10, Your Honor.

15 **MR. LEE:** Tab 10 questionnaires, Your Honor.

16 **THE COURT:** Okay.

17 **MS. MCCRACKEN:** And this is one, Your Honor, where the
18 parties are attempting to work together, and we've been
19 exchanging proposals to try to get to a joint questionnaire,
20 and we may be able to do that if the Court is willing to give
21 us a bit more time.

22 **MR. LEE:** I would welcome that, too, Your Honor. Last
23 night we told Google that we were prepared to agree to all
24 their questions.

25 **THE COURT:** You only get 10.

1 **MR. LEE:** That's helpful to know. Is it 10 total?

2 **THE COURT:** Ten total.

3 **MR. LEE:** Okay. I think with that framework, we can
4 work something out.

5 **THE COURT:** So a couple of thoughts. You all have
6 lived with this case for a long time. I expect that all of my
7 prospective jurors will not have. So on some of these
8 questions, the answer may just be "never considered," "never
9 thought about it."

10 These are normal people, you know. You have friends. Ask
11 them one of these questions. See -- how do they respond?
12 "What are you talking about? I've never even thought about
13 that." Exactly. And that's what many of these jurors are
14 going to -- for some of these might think. "What is your
15 impression, opinion, or feeling about a person's right to
16 privacy while using the internet?" I don't know. I never
17 thought about it.

18 **MS. MCCracken:** Your Honor, on that line, I think we
19 may reach agreement. Google tried to propose a bit simpler
20 questions that are just yes or no, "do you have a strong
21 opinion," to try to make it a little bit more juror friendly.

22 **THE COURT:** And that would be helpful because they may
23 have an opinion, but if it's not a strong opinion -- I'm only
24 really interested in strong opinions. Okay. So I'm going to
25 need your proposals by December 15th.

1 **MR. LEE:** Will do, Your Honor.

2 **MS. MCCracken:** Will do, Your Honor.

3 **THE COURT:** Okay. Great.

4 We don't need to talk about verdict forms right now.

5 Let's move to motions. Actually, hold on. Let me go through
6 my list before we go through motions.

7 Okay. So you are confirmed to proceed in this courtroom
8 on January 29th, 2024. However, you are trailing United States
9 vs. James. That case should be done by that time. I don't
10 think there will be any issue, but you are trailing.

11 The jury will come in at approximately 9:00. Trial itself
12 on a daily basis, as I just mentioned before, we start with the
13 jury at 8:30 every day. We start together at 8:00 a.m. This
14 is the way the trial day begins.

15 I'll have one person at each mic. I'll ask you for a list
16 of your issues. I don't want argument. I just want your list.
17 I need to know the totality of what's in front of me.

18 Once I have that list from each side, then we'll figure
19 out what we can accomplish in 30 minutes because that's all you
20 get. We'll obviously take the most important things. Jury
21 comes in at 8:30.

22 My schedule is -- for this case I will probably do Monday
23 through Friday, 8:30 to 1:40, with two 20-minute breaks. My
24 standing calendars remain at 2:00. To the extent that we have
25 to do something that needs to be done and we can't get it done

1 between 8:00 and 8:30, then you'll do it after my standing
2 calendars.

3 As I indicated, each side will be given 18 hours to
4 present your case. That includes openings and closings. I've
5 already explained how timing works.

6 There are two conference rooms in the attorney lounge.
7 Those are reserved on a first-come-first-serve basis. You can
8 do that through the clerk's office.

9 It is my standard motions in limine that all witnesses
10 shall be excluded until their testimony is complete. There
11 shall be no reference to settlement discussions, mediation, or
12 insurance. There is no reference to wealth or lack thereof
13 in -- unless we get to the punitive damages phase.

14 I always bifurcate punitive damages, so liability gets
15 tried on the front end. With respect to punitive damages, that
16 only happens in the second phase.

17 With respect to punitive damages, the way it works is that
18 by the morning of the 29th, defendants shall have all relevant
19 financial information in a sealed envelope and provide it to
20 the courtroom deputy. You shall have and identify the witness
21 who will be called to testify about that financial information
22 available on one hour's notice once the jury starts to -- well,
23 let's just do 30 minutes -- once the jury begins its
24 deliberations. Basically they need to be here in the
25 courthouse once the jury starts deliberating.

1 Any efforts to streamline that phase are appreciated,
2 although I'm not sure there will be. So that's the way it
3 works.

4 Anybody have questions about punitive damages and its
5 bifurcation from the primary?

6 **MR. BOIES:** Not from us, Your Honor.

7 **THE COURT:** Okay. Mr. Broome?

8 **MR. BROOME:** No, nothing from Google, Your Honor.

9 **THE COURT:** All right. You're all limited to calling
10 the witnesses that we have discussed. I know that there are
11 some questions about some, but you can't call any others except
12 upon a showing of good cause and only -- that would include for
13 rebuttal or impeachment purposes. I don't expect any surprises
14 in this particular case.

15 Same thing with exhibits. So nothing beyond what's in the
16 scope of that that's already been on file. We went through
17 your trial processes.

18 Okay. Equipment. You need to be at the microphones. If
19 you're a trial lawyer who seems to not be able to stay by a
20 microphone, and there are some, you can use encrypted digital
21 wireless systems that including a receiver and transmitter with
22 an XLR connector. You do you have to make arrangements to come
23 in with your equipment and try it so that we don't have
24 technical difficulties.

25 The U.S. Marshals are very cautious about what they let

1 people bring into the courthouse. You must have an order with
2 any equipment that you want, so send me a proposed form of
3 order about what it is that you want to bring in so that I can
4 authorize it. If I have any questions, we'll reach out to you.

5 This is a great courtroom for trials. These screens are
6 interactive, and they work. I just tried a case in
7 San Francisco, and the courtroom I was given did not have
8 working equipment, which was less fun. Those of you who are
9 going to be examining witnesses need to come in and practice on
10 the screens.

11 There are all sorts of things you can do. There's six or
12 seven different colors. You can mark them, you can tap them,
13 you can use arrows. Lots of different things that you can
14 control by the examining attorneys over there. Obviously, the
15 jurors have their screens. We'll probably -- I'll probably
16 have a couple more on the side, but, in any event, you need to
17 know how it works.

18 I expect that -- will the jury -- will some of this
19 evidence -- will any of the evidence that the jury has need to
20 be viewed on a computer, or is it all paper?

21 **MR. SHAPIRO:** Do you mean as opposed to projecting
22 something on a screen or something that's --

23 **THE COURT:** So the actual exhibits, are there any
24 exhibits that are only accessible by computer or are they
25 all --

1 **MR. SHAPIRO:** We can have -- I think right now we have
2 everything electronically because it would be this high, but we
3 can have paper copies of the things that we have
4 electronically. They're all --

5 **MS. TREBICKA:** Does Your Honor mean if there is a
6 document in native form that we need to manipulate the Excel
7 rows or something like that?

8 **THE COURT:** Is there a spreadsheet that really isn't
9 printable?

10 **MR. MAO:** For us, Your Honor, yes, because some of the
11 data at issue, the examples, right, so concrete example --

12 **THE COURT:** That's fine.

13 **MR. MAO:** Okay.

14 **THE COURT:** You need to then review the court's policy
15 regarding the jury's use of a computer during deliberations.
16 I'm going to have a comprehensive trial conference order, and
17 the website is noted there, but on our website, we do have
18 instructions about how the jury uses a computer. It's stripped
19 down. It's safe. There is no access to Google or ChatGPT or
20 anything else.

21 Okay. I will seat nine jurors. No alternates. You each
22 get three peremptory challenges. That is all.

23 I conduct most of the *voir dire*. You'll be allowed about
24 15 minutes, maybe 20, to conduct additional *voir dire*.

25 So let me explain to you how I do it because I do it

1 differently than other judges.

2 Who is going to be doing the *voir dire*?

3 **MR. BOIES:** I will be for the plaintiffs, Your Honor.

4 **MR. SHAPIRO:** And I for the defendants.

5 **THE COURT:** Okay. So this is what I do.

6 I realized early on, having been a state court trial
7 judge, that jurors hate to -- on the front end, because my
8 jurors actually love being jurors on the back end, but on the
9 front end, nobody wants to be a juror, and they're always
10 looking for excuses to get out of jury service.

11 So if they see something that works, all of a sudden,
12 everybody has the same excuse. And as you -- those of you who
13 tried cases in state court know and some courts, there are some
14 judges where they fill up the box, and if you excuse somebody,
15 then that seat gets taken, and it's kind of the hot seat, and
16 everybody knows, *Heck, I'm number one, I'm really going to get*
17 *on this jury* or whatever.

18 So I totally confuse them, and it works great. It
19 decreases the amount of tension. They all get called in. They
20 all have a number. There is a random order, and you will have
21 that. You will have the random, and you will have their
22 surveys, which will also -- which also help streamline jury
23 selection because you have all the basics.

24 What I'm doing and -- is in my *voir dire*, I use the
25 surveys as a means of being able to know -- to ask follow-up

1 questions to them. It's especially important in criminal
2 cases, but it works in civil case, too.

3 But what I do is I'll take probably 20. The first group
4 will be a batch of 20. I'll take the first 20 off the random
5 list, and I re-sort them alphabetically so they get called up
6 alphabetically, and they have no clue where they are on the
7 random list.

8 I will *voir dire* the first set of 20. If there is
9 somebody who obviously has an issue like *I work for Google* and
10 you haven't stipulated to excuse that person, I'll excuse them,
11 and a new person will get there. But what I'm trying to do is
12 get you 20, and then you'll have 15 minutes to *voir dire* them.

13 I conduct pretty thorough *voir dire*. If you actually find
14 something that I haven't, I'm not going to stop you in your
15 follow-up, and I'll give the other side an equal measure of
16 time. But so far, I haven't had to ever do that.

17 So once the 20 goes -- and this is a very organic process.
18 Let's see. Nine -- I'm seating nine. You each get three.
19 That's 15. I might call up a few more to have more than 20,
20 but then they'll take a break, and while they're on break, you
21 will do your strikes. We do strikes open, so I will ask the
22 plaintiff. You'll tell me who you strike, and then we'll move
23 to the defense. They will tell me who they strike. And we'll
24 go back and forth until we -- until we have the jury.

25 The jury then gets called back in, and I just call up the

1 people who got seated. And when I talk to jurors afterwards,
2 the very first question they ask is, "How did I get on the
3 jury" because they have no clue.

4 But it allows us to just cut with the anxiousness of being
5 seated and have a conversation about issues. So that's how I
6 do it.

7 Any questions?

8 **MR. BOIES:** No, Your Honor.

9 **MR. SHAPIRO:** No, Your Honor.

10 **THE COURT:** Okay. I do have your expert disclosures.
11 Any offers of judgment need to be made on the first day of
12 trial, or you need to lodge with me any offer of judgment made
13 by the first day of trial.

14 **MR. SHAPIRO:** I realize I have a question about maybe
15 what you were just discussing with how things are going to work
16 on the first day or so. Maybe you were going to get to this.

17 Does Your Honor have a rule with regard to opening
18 statements and closing argument about -- do you have a podium
19 rule that time attorney needs to be within, you know, a foot of
20 the podium, or since you mentioned those mobile microphones,
21 can I assume that attorneys can walk?

22 **THE COURT:** So that -- that podium there turns to the
23 side so that you can have notes there. I wouldn't expect you
24 TO be walking all over the well, but if you -- yeah. I would
25 say I wouldn't want you within two feet of the jury box. No

1 one has ever asked me, but this is, again --

2 **MR. SHAPIRO:** Thank you, Judge.

3 **THE COURT:** I am potentially surprised by this group.

4 So two feet. I'll add it to my standing order.

5 Okay. All defendants will be deemed dismissed once the
6 jury or the first witness is sworn.

7 In terms of depositions, I do need the actual transcripts.
8 Again, those can be delivered by January 5th. When you deliver
9 the transcripts, you must also have with them an index, and the
10 index shall have the name of the deponent -- it should be a
11 chart. It will have the name of the deponent and a place for
12 my courtroom deputy to confirm receipt and a place -- that is,
13 he's just going to put his initials -- and a place for one of
14 you to also confirm delivery.

15 This is because I've had instances way back when, when
16 people said, "But, Your Honor, we did deliver it," and the
17 courtroom deputy is looking at me and saying, "No, they
18 didn't." So this way I have an actual record of what was
19 delivered, both sides agree, and we have no issues.

20 Every morning you must confer with the courtroom deputy
21 and identify which transcripts might get used that day so he
22 can give them to me in advance and I'm not wasting time as he
23 looks for them in terms of potential use for impeachment.

24 So how do I do impeachment? It's up to you, obviously, if
25 you want to go through with the jury the whole -- what we would

1 call it -- the whole performance of *do you remember when you*
2 *were there on January 17th and you said that you were*
3 *testifying under oath* -- you know, do what you're going to do.
4 That's fine. I don't care. What I do care about is the actual
5 impeachment. So, again, I don't know you as trial lawyers, and
6 I don't trust you yet.

7 If you want to impeach someone, you need to say to me,
8 "Your Honor, please take a look at page 55, lines 3 through
9 10." I say, "Okay." I'll get my transcript. I'll look at
10 those pages. I know what the question is and what the answer
11 is, and I'll read them. And I'll say, "Go ahead." That means
12 you have my approval to impeach with that testimony.

13 If I say, "Nope, lay more foundation," it means I don't
14 believe that you have laid sufficient foundation for
15 impeaching. And then you do what you're going to do. Okay?

16 So any questions about how we do impeachment?

17 **MR. BOIES:** No, Your Honor.

18 **THE COURT:** Okay.

19 No speaking objections. So "Objection, hearsay."
20 "Objection, 702." "Objection," whatever, as long as it's
21 short. If I want argument, I will ask for it.

22 I had a trial once, three months, criminal trial. This
23 lawyer kept objecting under 702. One of the first questions I
24 got when I talked to the jurors, "What's 702?" They were
25 keeping count of how often she said 702.

1 So no speaking objections.

2 In terms of examination, direct examination requires that
3 you ask open-ended questions. You all know your case. You all
4 know the law. You all know what you would like the testimony
5 to be. But that's not the point. The point is that we have to
6 hear from the witnesses, and so this is your warning. If you
7 lead and there is an objection, I will sustain the objection.
8 I might sustain it twice. But if you don't get the point after
9 the second time, this is what will happen, and I've had to do
10 it.

11 "Ladies and gentlemen" -- or "Members of the jury" -- I'm
12 trying not to say "ladies and gentlemen."

13 "Members of the jury, they continue to object as to
14 leading, and I've sustained those objections. That is because
15 as I instructed you earlier, the lawyers are not witnesses. We
16 don't want to hear what the lawyers think. We actually want to
17 hear what the witnesses think. So they have to ask open-ended
18 questions so you can hear what the witness has to say, not the
19 lawyers. Objection sustained. Try again."

20 Do not make me embarrass you. The only reason you would
21 be asking leading questions is to get stuff in that you wanted
22 in in the way you want it in. And, by the way, if it's a bench
23 trial and you're leading, don't think that I'm going to be
24 particularly persuaded. I need to hear it from the witness,
25 not from you.

1 Any questions?

2 **MR. BOIES:** No, Your Honor.

3 **THE COURT:** It matters when people walk into a federal
4 courtroom and take an oath. I had a pretty high profile case
5 not that long ago where the lawyers for the whole time leading
6 up to this trial said, you know, the -- the whole theory is
7 that this witness wouldn't have done it -- would not have done
8 it just for the company. They're doing it for everybody. And
9 when that witness got up on the stand and took the oath, that's
10 not what the witness said.

11 Most of us almost fell off our chair. The lawyer had to
12 ask three different times, and that witness confirmed the
13 opposite of what the lawyer thought. So I know it is a
14 lawyer's nightmare, but it was the truth, and that's what we're
15 seeking.

16 I let jurors ask questions. They will have a binder.
17 Make sure that you've read my standing order. You're required
18 to give me pictures of the witnesses, not taken, you know, at
19 some photography store or something like that. You take them
20 the morning of, print it off, printed on a color printer. I
21 need one copy for each of the jurors plus two more. And in
22 their binder, they'll be able to take notes. They will have
23 the pictures, and they'll have some question sheets.

24 If someone asks a question, I'll share it with you. You
25 can either roll it into your examinations or I can ask myself

1 or I can tell -- and I use the standard instruction to the jury
2 about when they're allowed and when they're not allowed. Okay?

3 Any questions?

4 **MR. BOIES:** No, Your Honor.

5 **MR. SHAPIRO:** No questions.

6 **THE COURT:** Any need for interpreters?

7 **MR. BOIES:** I don't think so, Your Honor.

8 **THE COURT:** Are you going to be asking for daily
9 transcripts?

10 **MR. BOIES:** Yes, Your Honor.

11 **MR. SHAPIRO:** We will.

12 **THE COURT:** Okay. You need to do that sooner rather
13 than later. There is a form on the website and it will be in
14 the order, but we have shortages of court reporters, and so it
15 takes a lot of effort to -- yeah, you're surprised Mr. Shapiro?
16 There is a shortage of court reporters in the federal courts
17 and the state courts. So they have to find and make
18 arrangements to have scribes and other people to help them so
19 they can get those dailies out to you. So let's try to make
20 sure that you do that, make that request, let's say, by
21 December 15th.

22 I don't know if you're talking settlement. This is always
23 in my standing -- in my order, though. If you do settle, I
24 need to know by 4:00 p.m. on the Friday prior to the Monday of
25 trial. If not, you have to split jury costs. It's a couple

1 hundred dollars. And if it's more, it's still not that much.

2 Okay. You shall always, while you're on the record and
3 off the record, act in a professional way. Do not approach any
4 other parties' witness without my permission. You may approach
5 your own witnesses who are not hostile without permission.

6 During *voir dire*, I do not want you engaging with jurors,
7 so you can use the jury room bathroom. There are two in there.
8 You go in that door and out that door. You do not access the
9 other door because that's the secured hallway. Okay? But that
10 way during *voir dire*, you're not in those hallway bathrooms
11 with the jurors.

12 In the trial order, you'll be given some really standard
13 procedural stipulations. Those are just really basic things.
14 Hopefully you'll -- there will be no issues, so look at those.
15 Hopefully just approve them. If you have any objections, we'll
16 talk about it next time.

17 At the end of the trial, you will also certify trial
18 exhibits. You'll be required to review them, confirm the
19 accuracy, and then file the certification.

20 One of my colleagues was reversed by the Ninth Circuit,
21 had to retry a case because of something that went in that
22 wasn't supposed to. So this is not something that you should
23 take lightly. Make sure that you've got someone who knows what
24 they're doing, because you will be -- you'll be held to that.

25 Okay. Those are the standards for me. Any questions?

1 **MR. SHAPIRO:** Nothing Your Honor.

2 **THE COURT:** Then let's go to motions.

3 Are there any updates, first of all, that I should know
4 about?

5 **MR. SHAPIRO:** Regarding motions, Your Honor?

6 **THE COURT:** Correct.

7 **MR. SHAPIRO:** I do not believe so.

8 **MR. MCGEE:** I apologize. Ryan McGee from Morgan and
9 Morgan.

10 On Plaintiffs' Motion in Limine No. 5, we filed a
11 stipulation. I'm not sure if the Court has had a chance to
12 review it, but if that stipulation is acceptable, we would
13 withdraw that motion.

14 **THE COURT:** Okay. This is on the introduction of
15 disparaging evidence?

16 **MR. MCGEE:** Yes, Your Honor.

17 **THE COURT:** Okay. That is -- the stipulation is
18 granted. Motion in Limine No. 5 is deemed withdrawn.

19 Okay. Let's start -- we'll do this by docket number, so
20 Docket 975. This is the motion with respect to Amir.

21 Okay. Names again.

22 **MR. FRAWLEY:** Alexander Frawley from Susman Godfrey
23 for plaintiffs.

24 **MR. MARGOLIES:** Joseph Margolies from Quinn Emanuel
25 for Google.

1 **THE COURT:** Okay.

2 So this is the argument that -- just reduced to its
3 essence, plaintiff argues that the opinion should be excluded
4 on three grounds. One, because the survey is about implied
5 consent, and that's irrelevant.

6 **MR. FRAWLEY:** Yes, Your Honor.

7 **THE COURT:** Two, because Google cannot rely on
8 extrinsic evidence to support its interpretation of the
9 contract documents.

10 **MR. FRAWLEY:** Yes, Your Honor.

11 **THE COURT:** And, three, because Amir did not ask the
12 right questions.

13 **MR. FRAWLEY:** Yes, Your Honor.

14 **THE COURT:** Okay. Let's start with the issue of
15 consent.

16 **MR. FRAWLEY:** Sure. So the surveys are irrelevant to
17 whether any particular named plaintiff consented --

18 **THE COURT:** I agree with you generically. So why is
19 it relevant to their consent? You get to cross-examine them on
20 whether or not they consented, and a jury can decide, based
21 upon that evidence and your cross-examination, whether or not
22 there was consent.

23 How does some third-party survey bear on that topic?

24 **MR. MARGOLIES:** It bears on it in two ways,
25 Your Honor. The first is with respect to individual claims,

1 there are questions about what a reasonable person's
2 expectation would be; for example, whether there was a
3 reasonable expectation of privacy.

4 The privacy torts also have elements involving whether the
5 conduct was an egregious breach of social norms. So a survey
6 indicating that more than half of the respondents or a much
7 greater number of respondents believed that the conduct that's
8 challenged was occurring would be evidence that a reasonable
9 person would not consider this to be an egregious breach of
10 social norms or have a reasonable expectation of privacy.

11 And separately, Your Honor, implied consent is relevant to
12 the classwide claims --

13 **THE COURT:** There are no classwide claims that the
14 jury is deciding on.

15 **MR. MARGOLIES:** That's right, Your Honor.

16 **THE COURT:** So that argument does not persuade.

17 **MR. MARGOLIES:** If Your Honor does not intend to have
18 an advisory jury on those issues, we don't argue that that
19 evidence should be part of the injunctive relief question
20 before the jury.

21 **THE COURT:** Okay.

22 Response. Why isn't it relevant to the reasonable
23 expectation of privacy?

24 **MR. FRAWLEY:** The reason, Your Honor, is because that
25 gets us to which -- our second argument, that Google can use

1 the disclosures as extrinsic evidence.

2 **THE COURT:** Well, that's a separate issue.

3 **MR. FRAWLEY:** Well, we think it's related, Your Honor,
4 and if we think about how the parties litigated summary
5 judgment, how Google litigated its position and how the Court
6 evaluated these issues, all of us were talking about these
7 other issues like reasonable expectations, offensiveness. We
8 were looking at those issues through the lens of the form
9 contract; right?

10 So was it reasonable for users to expect what would happen
11 based on what the form contract says. So in effect --

12 **THE COURT:** Those were contract claims, though,
13 weren't they? I mean, we have both tort claims, and there are
14 contract claims. The tort claims have different elements of
15 proof.

16 **MR. FRAWLEY:** Yes.

17 **THE COURT:** How is it not relevant to the tort
18 elements of proof?

19 **MR. FRAWLEY:** It may normally be relevant, Your Honor.
20 I think our argument here is really the notion of the evidence
21 rule applying, and this would be sort of a way -- your ruling,
22 Your Honor, that you told the parties about at summary
23 judgment, that if --

24 **THE COURT:** I agree. With respect to contract claims,
25 I think that that's right. That's not my question. My

1 question relates to the tort claims.

2 **MR. FRAWLEY:** We think that if Google were allowed to
3 use the surveys for some of the elements of the tort claims,
4 that would effectively be an end run around the Court's ruling.

5 **THE COURT:** There are -- well, I take it that you're
6 not withdrawing your tort claims.

7 **MR. FRAWLEY:** Not at this time, Your Honor, no.

8 **THE COURT:** And there are -- evidence can be used for
9 lots of different purposes. Just because it cannot be used for
10 one purpose doesn't mean that it can't be used for another
11 purpose.

12 Do you concede that it's relevant for the tort elements?

13 **MR. FRAWLEY:** It may be relevant, Your Honor. That's
14 not the basis of our argument that it's irrelevant to those
15 claims.

16 **THE COURT:** You argued that it's not relevant to the
17 trial.

18 **MR. FRAWLEY:** Right.

19 **THE COURT:** That's what you argued.

20 **MR. FRAWLEY:** And -- and the reason is -- and it
21 sounds like Your Honor might disagree, but we understood the
22 rule about no extrinsic evidence, that that would cover not
23 just the contract claims -- claim. Sorry. Because --

24 **THE COURT:** So I have to go back and check. I --
25 and -- and I'll hear argument.

1 I warned you that I would not allow you to use extrinsic
2 evidence for purposes of interpreting the contract claims if
3 you argued that they were unambiguous. I've done that before.
4 We do it in patent cases all the time. We make people take
5 positions, and you stick by those positions, and then you can't
6 waffle later and get a second bite at the apple when you lose.

7 So you lost that argument. Why should you be allowed to
8 change your position now?

9 **MR. MARGOLIES:** Your Honor, I want to be very clear
10 that I'm not here to re-litigate what your rule says. We, of
11 course, defer to your own interpretation of your own rule.

12 In this case, these -- these survey -- the survey evidence
13 is relevant to rebutting expert opinions that plaintiffs intend
14 to put in. If plaintiffs are allowed to put in survey evidence
15 on a given topic and we are precluded from responding to that
16 with a survey that we believe is better constituted and more
17 informative, it would be highly prejudicial to us.

18 So if Your Honor's rule is that we cannot affirmatively
19 offer this survey evidence as means of contract interpretation,
20 we'll accept that rule. Subject to preserving any arguments
21 that we've made about a potential due process issue, we, of
22 course, accept Your Honor's rule.

23 But to the extent that it precludes us from even
24 responding to their survey evidence, we believe that would be
25 prejudicial.

1 And if I could say one more point on that, Your Honor. We
2 still believe that our contract is unambiguous. We have not
3 wavered from that position. But if we make the argument that
4 our contract is unambiguous and they can present unrebutted
5 survey evidence suggesting that it actually is ambiguous, then
6 even if the unambiguous evidence might have stood on its own,
7 that could prejudice the jury, so we should be able --

8 **THE COURT:** Remember, all evidence in some way is --
9 is viewed as prejudicial to the other side. That's not the
10 rule. 403 relates to unduly prejudicial. Something that's
11 good for the plaintiff is usually prejudicial for the defense
12 and vice versa. That's the nature of the -- of the process.

13 So that's not the point. The question is whether it is
14 unduly prejudicial under 403.

15 **MR. MARGOLIES:** Your Honor, I believe it would be
16 unduly prejudicial under Rule 403 in part because it would be
17 confusing to the jury for there to be unrebutted survey
18 evidence on one side. They know that we have survey evidence
19 that shows that --

20 **THE COURT:** How would they know that?

21 **MR. MARGOLIES:** Because it would be -- I believe,
22 Your Honor, it would be admitted for other claims. The tort
23 claims still require that evidence to come in because it
24 remains relevant to, for example, the privacy torts.

25 **MR. FRAWLEY:** Can I make a quick point on the point

1 that Mr. Margolies made about unrebutted testimony?

2 **THE COURT:** Okay.

3 **MR. FRAWLEY:** So we don't think that our survey expert
4 would be unrebutted because their survey expert, Amir, he also
5 submitted two additional reports, and those were rebuttal
6 opinions where he was critiquing what our survey expert did,
7 and we're not seeking to exclude any of those opinions, nothing
8 from those reports.

9 So under our framework, now that I'm thinking about it,
10 our survey expert would testimony and their survey expert Amir,
11 would testify --

12 **THE COURT REPORTER:** I'm sorry. This is the court
13 reporter. You are too close to the mic, and I'm having
14 trouble. If you could back up a little bit. Thank you.

15 **MR. FRAWLEY:** Sorry. Is that better?

16 **THE COURT REPORTER:** That is much better. Thank you.

17 **MR. MARGOLIES:** Your Honor, may I respond briefly?

18 **THE COURT:** Hold on.

19 By the way, why was this brought as a *Daubert*? It seems
20 to be procedurally improper? You're limited to the number of
21 motions that you could bring. You used all your motions, and
22 then you bring this motion.

23 **MR. FRAWLEY:** No. I'm sorry, Your Honor. This is
24 only our second *Daubert* motion. We submitted one with class
25 certification against their expert Psounis. This was denied.

1 This is the second time we bring a *Daubert* motion.

2 I think you might be referring to our argument against
3 their *Daubert* as to Hochman where we argue well, this is their
4 fourth, that's improper.

5 **THE COURT:** Okay. This motion was brought under
6 *Daubert*?

7 **MR. FRAWLEY:** Yes, Your Honor.

8 **THE COURT:** And it was filed in August, which is past
9 the deadline for filing *Dauberts*.

10 **MR. FRAWLEY:** No, Your Honor. Actually, we -- we
11 agreed after summary judgment to a case schedule for things
12 including *Daubert*, and that was --

13 **THE COURT:** How is this a *Daubert*? It seems to be an
14 end run around my limitation on motions to -- in limine and --
15 I mean, this looks like a motion to exclude. There is nothing
16 wrong with the analysis.

17 **MR. FRAWLEY:** So we -- we're bringing this under the
18 relevance prong of *Daubert*, under the fit requirement. We're
19 not arguing that his surveys are unreliable, although our
20 survey expert will make those points himself.

21 Your Honor, just looking at the *Daubert* standard on page 4
22 of our opening brief, the proposed expert testimony must be
23 relevant to the task at end, i.e., logically to advance a
24 material aspect of the proposing party's case.

25 **THE COURT:** I hear what you're saying.

1 Okay. What else do you want --

2 **MR. FRAWLEY:** I would like to just briefly discuss our
3 third point.

4 So even if Your Honor were to agree with Google's argument
5 that things can come in for the tort claims, notwithstanding
6 the extrinsic evidence rule, even if Your Honor accepted that
7 argument, we don't think these surveys are still relevant
8 because they actually surveyed the wrong thing.

9 So these surveys did not focus on signed-out browsing.
10 They did not focus on browsing on non-Google websites. And
11 that's the core of our case. Those are key limitations to our
12 claims, which make the claim stronger, and ye Amir did not ask
13 about those scenarios.

14 If a jury were to use these surveys to decide reasonable
15 expectations, they would be deciding reasonable expectations
16 for a very different case, one that includes signed-in and one
17 that includes google.com browsing. So that also make the
18 surveys irrelevant.

19 Even if they were relevant to an issue being litigated,
20 they would be irrelevant as asking the wrong questions. And I
21 will point you to the *Rawles* case which we cited in our brief.
22 That's a case where the court -- a district court excluded
23 surveys that it said used the -- there is an analytical gap
24 between the questions asked and the metric that was at issue.
25 So we think that that case squarely applies here.

1 **THE COURT:** Response.

2 **MR. MARGOLIES:** Your Honor, there is no analytical gap
3 between the questions here and the conclusions that were drawn.
4 But before I even get to that point, I would just like to point
5 out that these are all methodological critiques. They go to
6 the formation of the questions, the methodology of the survey,
7 which Mr. Frawley has just said they're not questioning the
8 reliability of.

9 It's very clear under Ninth Circuit precedent -- and we've
10 cited a lot of that in our brief -- that methodological
11 critiques go to the weight, not the admissibility of the
12 evidence.

13 It sounds like all of the critiques that Mr. Frawley
14 raised could easily be asked of Dr. Amir on cross-examination
15 rather than be a basis to exclude his testimony entirely.

16 On the actual surveys themselves, though, the two
17 critiques I heard was that it didn't specify in the questions
18 that users were logged out, which is part of the class
19 definition, and it didn't specify that they were on non-Google
20 websites, but neither of those is a serious methodological
21 issue.

22 On the logged-out point, one of the core purposes of
23 Incognito Mode is that it logs out users from all of their
24 accounts as soon as they enter the mode. It's the default
25 state.

1 So if the questions are about browsing in Incognito or a
2 private browsing mode, asking about logged out is unnecessary.
3 That is the default state and indeed the purpose of the mode.

4 As to visiting non-Google websites, it was very clear from
5 the questions, including portions of the survey that said do
6 you expect services that provide ads and analytic services to
7 websites to receive your data, but the questions were geared at
8 third-party websites and not at Google owned and operated
9 websites. So these are not serious methodological concerns,
10 certainly not an analytical gap.

11 And a final point, Your Honor, is that even if there were
12 a gap, there is no requirement under *Daubert* that the survey
13 answer the ultimate question that the jury is tasked with, just
14 whether it's relevant, just whether it would help the finder of
15 fact. And in this case, the survey evidence clearly gets the
16 jury closer to answering that ultimate question.

17 **THE COURT:** Okay. I'll take it under submission.

18 **MR. MARGOLIES:** Thank you, Your Honor.

19 **THE COURT:** Next.

20 **MR. FRAWLEY:** Thank you, Your Honor.

21 **THE COURT:** The next one is this motion to exclude
22 certain of Google employee witnesses.

23 As I understand it, at this point we're only talking about
24 Caitlin Sadowski and Steve Ganem; is that right?

25 **MR. FRAWLEY:** Yes, Your Honor.

1 **MS. CRAWFORD:** Yes, Your Honor.

2 **MR. FRAWLEY:** Sorry. It's Alexander Frawley again for
3 the plaintiffs.

4 **MS. CRAWFORD:** Jomaire Crawford.

5 **THE COURT:** Okay. Motion is denied.

6 Next motion.

7 **MR. FRAWLEY:** Does that include, Your Honor, our
8 request for discovery, which was an alternative request that we
9 made? Just to be able to cross-examine these witnesses with
10 their custodial documents?

11 **THE COURT:** So let me -- let me go through this.

12 You were first told about these witnesses back on
13 September 30th, 2020; correct?

14 **MR. FRAWLEY:** I don't think that's correct,
15 Your Honor.

16 **THE COURT:** Is that wrong?

17 **MS. CRAWFORD:** My understanding is that they were
18 disclosed in February 2021 in response to plaintiffs' request
19 for document production.

20 **THE COURT:** Okay so February 2021.

21 **MR. FRAWLEY:** Can I just make one really quick
22 clarification on that? That was not a Rule 26 disclosure.
23 That was a list of over 200 employees that Google gave us and
24 said these are the employees who might become custodians. It's
25 Exhibit 6 to our motion.

1 **THE COURT:** Okay. You tried to exclude those, and
2 van Keulen denied the request.

3 **MR. FRAWLEY:** Well, not exactly, Your Honor. And so
4 not at all for Dr. Sadowski, but for Mr. Ganem, we asked for
5 his custodial documents in February of 2022 when they finally
6 disclosed him under Rule 26. She said no to custodial
7 documents but yes to the deposition.

8 For Dr. Sadowski --

9 **THE COURT:** So why would you have to depose him again?

10 **MR. FRAWLEY:** Your Honor, I -- I agree with you, our
11 motion is much stronger as to Dr. Sadowski.

12 **THE COURT:** So it's denied. Your request for
13 discovery with respect to him is denied.

14 Okay. Now with respect to Sadowski.

15 **MR. FRAWLEY:** Yes. She was --

16 **THE COURT:** Sadowski you've got on your trial list so
17 you knew this was an issue; right?

18 **MR. FRAWLEY:** We put her only because we were
19 mindful --

20 **THE COURT:** She was identified as a 30(b)(6) witness.

21 **MR. FRAWLEY:** At the very end of discovery on some
22 limited topics, yes.

23 **THE COURT:** Okay. So you knew at the end of
24 discovery, and you could have chosen to depose her at that time
25 or at least notice it, and if you had noticed it, then you

1 could have gone to Judge van Keulen to make sure that you had
2 time. Am I correct on the timing?

3 **MR. FRAWLEY:** Her 30(b)(6) witness took place, I
4 think, on March 10th or March 4th. There is two dates in
5 my head, but --

6 **MS. CRAWFORD:** March 10.

7 **MR. FRAWLEY:** March 10. That was after the close of
8 discover.

9 I suppose we could have said on the 30(b)(6) witness we
10 also want to take them as a fact witness, but there are a
11 couple people who fit this bucket. There were a few people who
12 became 30(b)(6) witnesses, and I don't think Judge van Keulen
13 would have appreciated if we tried to sort of bring all those
14 motions. We want all these extra depositions --

15 **THE COURT:** But now you're asking me to do it on the
16 eve of trial. Denied.

17 **MR. FRAWLEY:** Okay.

18 **THE COURT:** Denied. The motion is denied.

19 Next motion. Next I have at Docket 1001. There was a
20 letter brief that was filed with respect to Hochman.

21 Let me be clear about something, and this is always my
22 rule. No one ever, ever, ever, ever in trial refers to any
23 court proceedings for any reason whatsoever without explicit
24 authorization. You will not -- no one will refer to any orders
25 for sanctions, summary judgment, or anything that I have

1 ordered or that Judge van Keulen has ordered. No witness shall
2 refer to it, no lawyer shall refer to it. You will be
3 sanctioned if you do.

4 If there is a need to do it, you will ask permission and
5 tell me why, and I will have the context, and I will consider
6 it. It will not be done. Do you understand?

7 **MR. FRAWLEY:** Understood, Your Honor.

8 **THE COURT:** Hochman shall not do that. Do you
9 understand?

10 **MR. WRIGHT:** Yes, Your Honor.

11 Apologies. This is Logan Wright for the plaintiffs.

12 **THE COURT:** There are a number of things. I looked at
13 his expert report and the paragraphs that were referenced in
14 the letter brief. There are a number of -- of inappropriate
15 statements by him relative to those issues. That shall not be
16 allowed and would never be allowed.

17 There were other statements in there because it was mixed
18 together that were appropriate. And I am not going to sit here
19 and micromanage portions of sentences. The rule is the rule.
20 Do you understand?

21 **MR. WRIGHT:** Yes, Your Honor.

22 **THE COURT:** Okay. That one is resolved.

23 **MR. BROOME:** Thank you, Your Honor. And Stephen
24 Broome for Google. I think that also resolves our MIL 1 as
25 well.

1 **THE COURT:** By the way, the three-page letter brief
2 was so much more persuasive than your 10, 15 pages of just
3 rambling. Seriously, you all should take -- you should all
4 remember Mark Twain.

5 **MR. BROOME:** A shorter letter, yes.

6 **THE COURT:** Take the time to write it shorter. It's
7 more persuasive.

8 **MR. BROOME:** Thank you, Your Honor.

9 **MR. MAO:** Just a quick question on that in terms of
10 the nuances on how to implement that order, and of course we
11 heard you loud and clear, Your Honor, which is insofar as data
12 algorithms that were not produced and Google just refused to do
13 that, that did end up in proceedings, and there were -- it's
14 not called orders. There were requirements in which they
15 ultimately still did not comply with.

16 So how do we maneuver around that? Obviously we will seek
17 your guidance, Your Honor, but --

18 **THE COURT:** So I -- so I am happy to work with you on
19 that. They do not --

20 **MR. MAO:** I understand.

21 **THE COURT:** They do not get a free pass, and -- and --
22 but I have to manage that in a very precise way. And those are
23 the kinds of things that you should say *this is what I want to*
24 *do*, and so that I understand what the context looks like and I
25 can tell you the appropriate means of doing it.

1 Those sanctions orders are meaningful. And you should
2 have produced things that you didn't produce. But that's --
3 that's our process. That's not something that I will just
4 have, you know, doors open for the jury. So I will micromanage
5 that. And that's why the -- the default is nothing, and you
6 come and you ask in a specific context.

7 **MR. MAO:** I heard you loud and clear, Your Honor, and
8 we will come and ask. Thank you.

9 **THE COURT:** All right.

10 1015, the next one on the docket.

11 I am not inclined to have a sideshow in this trial.

12 **MR. LEE:** I think you're directing that to me, Judge.

13 **THE COURT:** I am.

14 **MR. LEE:** There will be no sideshow, Judge.

15 **THE COURT:** I'm not so convinced. So -- and I don't
16 know what relevance -- what probative value there is in light
17 of the huge baggage with which that witness comes. So the best
18 I can do is have an evidentiary hearing in advance to figure
19 out what it is he has to offer so that I can balance that
20 against the defendants' appropriate ability to cross-examine on
21 things that, again, would, in my view, create a sideshow.

22 So that's the best I can offer. And I would suggest that
23 you think about it, and if you want to have that evidentiary
24 hearing in advance, I have very few days to offer you. But I
25 could find something the first or second week of January.

1 **MR. LEE:** We will take anything we can get, Judge.
2 We'll have to check with the witness, but we'll make ourselves
3 available.

4 **MR. SHAPIRO:** And, Your Honor, this is Andrew Shapiro
5 for Google.

6 Our position on -- surprisingly is that even -- that even
7 if an evidentiary hearing would -- would support whatever it is
8 the plaintiffs think it would support, this witness shouldn't
9 be allowed to be added at this late date, in any event. So
10 there are lots of reasons. Obviously one independent reason
11 not to allow this witness is --

12 **THE COURT:** Well, they didn't -- you can make your
13 record. I don't agree with you. He came to them. It's not as
14 if he'd been hiding this. And he has told them and they gave
15 you notice as soon as they knew or as soon as they reasonably
16 could after they knew, so I'm not persuaded by that argument on
17 your side.

18 **MR. SHAPIRO:** I've made my record. That's fine,
19 Your Honor.

20 **MR. LEE:** In terms of the evidentiary hearing,
21 Your Honor, just from a process perspective, will there be
22 documents exchanged in advance, depositions --

23 **THE COURT:** I don't know. You don't have documents?
24 You don't --

25 **MR. LEE:** He's a former Google employee, Judge, so

1 they have all the document. We've requested those documents.
2 They refused to produce them to us.

3 There is a motion to compel pending on that, and that's
4 sort of been the holdup because what we're asking for is
5 produce the documents. Let's take his deposition, and then we
6 can all decide what's what and what's not what.

7 And so far Google has had a hundred days to respond to our
8 disclosure. They refused to pull any documents. We know
9 they've collected them, but they refused to turn them over to
10 us, and they refused to have him sit for deposition. I think
11 that would clarify a lot of the issues --

12 **THE COURT:** How can they refuse to let him sit for
13 deposition?

14 **MR. LEE:** We've offered him for deposition, and they
15 won't notice him. Instead, they are moving to strike him so
16 that he could never testify.

17 I think we have to do this in stages. So if they were to
18 produce the documents and then they could take his deposition,
19 I think we could submit to Your Honor briefing on it. It could
20 be very short. We'll attach the deposition. And then
21 Your Honor can decide, you know, on balance whether -- whether
22 Mr. Lemoine's testimony is going to be meaningful to the jury.
23 We think it's going to be very, very meaningful to the jury.

24 And I can touch on some of the relevance because you had
25 asked about that if it would be helpful for the Court.

1 **THE COURT:** Go ahead.

2 **MR. LEE:** So he's going to testify, in a nutshell,
3 that Google's AI uses private browsing data across its
4 services, including Chrome, and that AI can merge users'
5 private browsing profiles with their non-private browsing
6 profiles.

7 The AI also can re-identify users, even when they're in
8 private browsing mode. The reason why that's important, Judge,
9 is throughout this litigation, Google has taken the position
10 that it doesn't do any of those things. So it's highly, highly
11 relevant.

12 In addition to that, he'll testify how Google forbids
13 written documentations of these exact practices and that when
14 he spoke up and others spoke up to raise concerns, they were
15 silenced. So this is -- these are brand new facts. And he's
16 the only person that will testify that can talk about these
17 things.

18 So, you know, candidly, Your Honor, the -- the sideshow
19 aspects are not going to be anything that we introduced to the
20 Court. What Google has said is they're going to attack his
21 credibility; right? They're free to do that on cross. If they
22 think that's a good use of their time, they're free to do that.

23 And I guess the way I look at it, Judge, is if the cross
24 on his credibility is so good and he really has nothing to say,
25 then why are they working so hard to preclude him? Why don't

1 they just turn over the documents and take his deposition. And
2 then if there is still a question then, I think Your Honor can
3 decide.

4 **THE COURT:** Mr. Shapiro.

5 **MR. SHAPIRO:** So, Your Honor, I -- this is Exhibit A
6 or at least as aspect, an important aspect of why we maintain
7 our position that the late request here is relevant because
8 what the plaintiffs have asked for is for us -- so I can
9 represent we've not pulled all of Mr. Lemoine's documents.

10 The plaintiffs have asked us now or in August, right
11 before our pretrial binders were due, to -- they've declined
12 our request for a deposition unless we went through and
13 provided discovery on this former employee who didn't work on
14 any of the products at issue here, who worked in AI, and then
15 Search. They've accused us of concealing or trying to hide
16 this witness, which is absolutely not the case. This person's
17 name didn't come up in two years of discovery, and it's not
18 because anybody was hiding anything. It's because what he has
19 to offer is tangential at best in this case.

20 And on the cross-examination in particular, you heard it
21 from Mr. Lee a moment ago, they are going to argue that Google
22 has some culture of retaliation, and so we will be within our
23 rights and we are going to have use portions of everybody's 18
24 hours, I guess our 18 hours, to explain why this person is no
25 longer working at Google.

1 It's not efficient, it's not fair, it's not consistent
2 with the rules. If -- I'll leave it at that.

3 **THE COURT:** Well, it sounds as if you've got a -- on
4 the plaintiffs' side, a potential whistleblower who -- who
5 really, in many ways, guts much of what you say if he's
6 credible, much of what your client says.

7 And I also have been told that the key people who are
8 running your operation you're refusing to bring in from Europe,
9 even though you're a multibillion dollar company.

10 So I don't know. I am not so convinced that I shouldn't
11 allow him to testify.

12 **MR. SHAPIRO:** Nothing that Mr. Lemoine can testify to
13 will gut what Google is saying or destroy our defense. We will
14 win this case whether he testifies or not.

15 **THE COURT:** You have argued that the unauthenticated
16 information cannot and has not ever been matched with users.
17 That is the perspective. And that the mere fact that you have
18 the ability to do it doesn't mean that you have done it.

19 We are not in a position to just trust what Google says.
20 That's why we have an adversarial process. There are plenty of
21 corporations who do not always accurately describe what it is
22 they're doing. That's why we have a trial process.

23 Now, you could be right; you could be wrong. I don't
24 know. But here I have a proffer that suggests that it can be
25 done, has been done, and that seems to be directly

1 contradictory to Google's position. That's what I'm hearing.

2 **MR. SHAPIRO:** At the threshold or just to introduce
3 what I'm about to say, if Your Honor is going to direct us to
4 have an evidentiary hearing, we will have a hearing, but I want
5 to clarify a couple of things.

6 No one is asking the jury, no one is asking the Court
7 simply to trust Google that this joining doesn't occur. There
8 has been a tremendous amount of discovery, depositions, there
9 will be expert witnesses, there will be vigorous, I'm sure,
10 examination and cross-examination of Google witnesses who work
11 actually on Incognito and on Chrome and beyond and by all of
12 these things and there has been.

13 I'm looking at Mr. Lemoine's declaration here. The only
14 thing he says -- I'm tested, but it's in his declaration -- he
15 says in paragraph 9 of his declaration, which is Document
16 1042-1 -- "While I worked at Google, Google took the
17 position" -- I'm -- I would put a dot, dot, dot in here because
18 I'm skipping to the end of that paragraph -- "that information
19 inferred about a user through AI was considered data about the
20 user owned by Google rather than user data owned by the user."
21 And then he says that he believes later on that Google could
22 infer certain things about how a user is based on patterns.

23 So, A, I don't think that is some direct whistleblowing in
24 any way; B, I think in any fairness, if the case is going to go
25 down that road now, we are going to be arguing about what AI

1 can or can't do, something that has never been an issue in this
2 case. Then we have a right, just in terms of fundamental
3 fairness, to put on or bring witnesses of our own to rebut
4 that, which is going to completely derail the timing of -- of
5 this trial or leave us unable to -- to actually answer these
6 Eleventh-hour claims.

7 **THE COURT:** Well, I don't know, because I don't know
8 exactly what he's going to say. I've only had a proffer.

9 So you're ordered to produce the documents. Now, I can
10 get into the micromanaging of it, or if it's already briefed in
11 front of Judge van Keulen, she can do it. Or you can all agree
12 on what's critical, which, again, I'm not exactly sure that you
13 will, given your history. And a deposition shall be taken.
14 And all of that has to happen by December 22nd.

15 **MR. LEE:** Thank you, Your Honor.

16 **THE COURT:** They need documents no later than
17 December 11th at noon. So figure out what's going to be
18 produced. I'll let her know.

19 **MR. LEE:** Thank you, Your Honor.

20 **MR. SHAPIRO:** Thank you, Judge.

21 **THE COURT:** Okay. Next issue, 1020. It's the next on
22 the docket. Plaintiffs Motion in Limine No. 1.

23 Oh, on that last issue, I need a joint notice filed by
24 December 27th as to whether or not you want an evidentiary
25 hearing, or at least your respective positions on that topic.

1 One statement, no longer than a page and a half.

2 Okay.

3 **MR. MCGEE:** Your Honor, Ryan McGee for the plaintiffs.

4 **MS. CRAWFORD:** And Jomaire Crawford for Google.

5 **THE COURT:** Thank you.

6 **MS. CRAWFORD:** Thank you.

7 **THE COURT:** All right. Request to preclude Google
8 from relying on its non-public source code.

9 **MR. MCGEE:** Yes, Your Honor. It relates to one
10 particular piece of source code that Google disclosed on its
11 exhibit list and that --

12 **THE COURT:** And I take it Google wants to use this?

13 **MS. CRAWFORD:** We would like to have the ability to
14 reference it, including an expert report, if plaintiffs
15 introduce a particular argument about a log for which that
16 source code would be relevant to rebut their allegations.

17 **THE COURT:** And do you plan on relying on such log?

18 **MR. MCGEE:** Your Honor, Dr.-- excuse me -- Mr. Hochman
19 authored a second supplemental report that --

20 **THE COURT:** The one with all the inappropriate
21 statements?

22 **MR. MCGEE:** That -- yes, Your Honor. The one that you
23 referenced earlier, yes, Judge.

24 In that report, he references what's called a joined log
25 where there's both --

1 **THE COURT:** Which paragraph?

2 **MR. MCGEE:** Sorry. I didn't --

3 **THE COURT:** And what tab is it in my binder or
4 binders?

5 **UNIDENTIFIED SPEAKER:** Tab 14 in your binder.

6 **THE COURT:** Okay. Thank you.

7 All right. So what paragraph are we talking about?

8 **MS. CRAWFORD:** If I may, there is a sealed version of
9 these documents, and I just want to make sure that Mr. McGee is
10 not in open court using any of the sealed terminology in
11 reference to these log-related issues.

12 **THE COURT:** I asked for a paragraph number.

13 **MR. MCGEE:** Your Honor, in the introduction, paragraph
14 2.

15 **THE COURT:** Paragraph 2?

16 **MR. MCGEE:** Correct. It's the --

17 **THE COURT:** So the second or what?

18 **MR. MCGEE:** The second bullet, Your Honor.

19 **THE COURT:** Okay. Hold on. All right. This
20 references 46 logs. And does this issue concern all 46 logs?

21 **MR. MCGEE:** No, Your Honor. One particular log.

22 **THE COURT:** All right. So what's the other paragraph?

23 **MR. MCGEE:** If you also move to paragraph 40 of the
24 report. I think that's getting into some of the sealed
25 material, Your Honor.

1 **THE COURT:** All right. So in the documents that you
2 gave me, I can't tell what's being requested to be sealed
3 versus not. Just an FYI. So when you send us documents, you
4 may want to send us versions of the documents where things are
5 highlighted. They were not.

6 So paragraph 40 has seven lines. Which of these have you
7 asked to seal or which are sealable?

8 **MS. CRAWFORD:** I believe we're looking at paragraph
9 43.

10 **THE COURT:** You said 40.

11 **MR. MCGEE:** My apologies, Your Honor. I was walking
12 through it. But it is paragraph 43 that references the
13 specific log that --

14 **THE COURT:** All right. Hold on. Paragraph 43 has 12
15 lines. So tell me what lines we're talking about. It has 4
16 lines on page 18 and lines 5 through 12 on page 17.

17 **MR. MCGEE:** I believe it starts on line 5, Your Honor.

18 **MS. CRAWFORD:** 5 through 9 contain references, many of
19 which are in quotations, to materials -- sorry -- to
20 descriptors that are under seal.

21 **THE COURT:** Okay. So you -- so now that I have the
22 information, explain to me again what it is you want to use at
23 trial.

24 **MR. MCGEE:** Your Honor, throughout the litigation, as
25 you -- I believe we've touched on a couple of times, Google has

1 made the argument that authenticated data and unauthenticated
2 data is never joined, and, again, I'm trying to tiptoe around
3 the sealing issue here, but Mr. Hochman analyzed some of these
4 logs and had some information on these logs, not full
5 information. It was not subject to full discovery.

6 But what he was able to do is with the information that he
7 had and that is included in this second supplemental report was
8 come closer to, if not concluding that, Google does join the
9 data. And it's specifically in this log.

10 **THE COURT:** Okay.

11 **MR. MCGEE:** And when Mr. Hochman raised this, Google
12 then authored the Psounis rebuttal to his report, Dr. Psounis,
13 that stated that he analyzed or that he had previously analyzed
14 this log, the source code that controlled how the log was
15 written. So just how it was written, Your Honor, not what was
16 done with it afterward, not what may have been done with it in
17 other systems at Google. It didn't control how the information
18 would be excised from that log but just how it was written at
19 Google.

20 And he concluded that based on his limited review of the
21 source code that Google provided to him, not that he went and
22 looked at Google's source code and selected certain portions
23 but he asked for the source code that wrote the log, that he
24 was concluding that it was not joined by Google's definition of
25 what "joined" is.

1 So we get into a little bit of a vocabulary dispute on
2 plaintiffs' suggesting that "joined" is the information goes to
3 the same place and then Google saying well, the information is
4 just on different lines in the same place and that's not joined
5 by Google's 's definition.

6 The prejudice that we face -- and it's unfair prejudice,
7 Judge, it's undue, unfair prejudice -- is that this source
8 code, again selected by Google, was never disclosed during the
9 regular course of discovery, it wasn't disclosed in the first
10 round of sanctions, and it was only disclosed as a defense in
11 the second round of sanctions.

12 Mr. Hochman had one of his assistants, who is one of the
13 consultants in this case -- he had him go to Quinn Emanuel's
14 offices in Washington, D.C. I attended with him. For two
15 days, we looked at snippets of source code, and based on the
16 review, we had more questions than we had answers.

17 Basically devolved -- I know there is a lot in the
18 briefing, but we basically contend that because the non-public
19 source code was never produced during discovery, Google opposed
20 the production of that at least 12 times during normal course.
21 It went to the special master for his review. The special
22 master determined that it wasn't relevant to any claim or
23 defense of the case, and he ordered that no public --
24 non-public source code would be produced in this case.

25 And then when Google was facing a second round of

1 sanctions to defend against a very particular part of that
2 sanctions, Google then allowed one of its experts to review
3 that source code.

4 And then I also deposed that expert, Dr. Psounis, and
5 again raised more questions than we had answered. He doesn't
6 know who manages the source code, he doesn't know when that
7 source code was implemented, he didn't know if there were prior
8 versions of it, he didn't know if there were safeguards, he
9 didn't know how it could be disabled or modified. He basically
10 accepted a piece of source code from Google, conducted a
11 limited analysis of it, and gave the opinion that I just
12 summarized for Your Honor.

13 **MS. CRAWFORD:** Your Honor, may I be heard?

14 **THE COURT:** You may.

15 **MS. CRAWFORD:** What Mr. McGee's argument omits is that
16 as a result of the source code --

17 **THE COURT:** Let me ask you first.

18 **MS. CRAWFORD:** Yes.

19 **THE COURT:** Is there anything that he said to me that
20 was a misstatement? Did he inaccurately describe anything?

21 **MS. CRAWFORD:** Insofar as he omitted that --

22 **THE COURT:** I'm not asking for admissions. You can
23 get to those. There was -- was there anything affirmatively
24 that he said that was inaccurate?

25 **MS. CRAWFORD:** Yes. Plaintiffs were given a full

1 opportunity to examine the code, not snippets, full files of
2 source code. 14,000 lines of additional source code were
3 offered to plaintiffs to be reviewed, and they declined
4 Google's offer.

5 Many opportunities --

6 **THE COURT:** So this was before or after they went to
7 Quinn Emanuel in Washington, D.C.

8 **MS. CRAWFORD:** In connection with that process.
9 After -- Mr. McGee referenced questions arose, and as a result
10 of negotiations with us, we offered to produce 14,000
11 additional lines of code, and plaintiffs refused to examine
12 that additional source code.

13 **THE COURT:** When was the -- when did you go to Quinn
14 Emanuel's office in D.C.?

15 **MR. MCGEE:** It was February of 2023, Your Honor.

16 And I would like to see this email. I'm not saying that
17 we didn't decline it, but I do recall multiple rounds, and I
18 spent 19 hours looking at that source code with Mr. Bhatia, and
19 I know that were tens of thousands of lines, so that's nowhere
20 in this briefing, so I'm not prepared on it. I'm not saying
21 it's a misstatement, but --

22 **MS. CRAWFORD:** Your Honor, if I may?

23 **THE COURT:** You should not interrupt.

24 **MS. CRAWFORD:** Apologies.

25 **THE COURT:** All right.

1 **MR. MCGEE:** I had nothing further, Judge.

2 **THE COURT:** Go ahead.

3 **MS. CRAWFORD:** My colleague, Mr. Margolies, was
4 involved in this and can speak directly to that process.

5 **MR. MARGOLIES:** Your Honor, if I may.

6 **THE COURT:** You may.

7 **MR. MARGOLIES:** It is -- it is not the case that
8 plaintiffs as a whole declined to review the 14,000 additional
9 lines of source code. Mr. Hochman declined to review it.

10 What Mr. McGee describes, Mr. Bhatia did review that
11 source code. The parties conferred on an opportunity for
12 Mr. Bhatia to submit an expert declaration or other evidence or
13 argument concerning the purport of that source code, and he
14 declined to do that.

15 **MR. MCGEE:** I'd like to address that one thing,
16 Your Honor. The --

17 **THE COURT:** This is Bhatia, B-H-A-T-I-A?

18 **MR. MCGEE:** B-H-A-T-I-A, yes, Your Honor.

19 And -- okay. So to clarify, we did in some capacity
20 review all 14,000 lines of the source code. It's that
21 Mr. Hochman declined.

22 And, Your Honor, Mr. Bhatia submitted a declaration based
23 on his initial review of some source code for the sanctions
24 process. He then went back in February-- I believe that was in
25 December of 2022. He then went back in February of 2023. I

1 accompanied him. Again, I think it was February 10th and 11th.
2 I'm not saying that's absolutely correct, but it was somewhere
3 in there. And, again, he had more questions than he had
4 answers. We were going toward the sanctions hearing which I
5 believe was March 2nd of 2023, and he had no new opinions.

6 So when we said we weren't submitting a new declaration,
7 it's because there was nothing new to declare. And when we
8 were going to the sanctions process, that was initially
9 understood by the plaintiffs to involve witnesses.

10 Google then declined to bring any witnesses. Mr. Bhatia
11 and our consultants showed up in case Judge van Keulen had
12 questions, but she did not take witness testimony.

13 So it's a bit of a misnomer. I'm not saying it's a
14 complete misstatement, but the declination to submit the
15 supplemental declaration was because there was nothing new to
16 declare.

17 So that's kind of the legislative history, Your Honor. I
18 don't know if we want to get to why we want it excluded from
19 the jury process.

20 **THE COURT:** So when was this supposed to have been
21 disclosed?

22 **MR. MCGEE:** The first request that plaintiffs made for
23 source code was on October 19th 2020, and that was
24 approximately two and a half months after we filed the case.
25 It was in our second request for production.

1 Google then declined on December 2nd of 2020, and then
2 again we went through the 12 or, I guess it would be 11,
3 additional asks, and they repeatedly assured the Court and
4 plaintiffs that the non-public source code would not be
5 relevant to any claim or defense in the case.

6 **THE COURT:** Is that accurate?

7 **MS. CRAWFORD:** It's accurate insofar as plaintiffs
8 requested various categories of source code from Google. Those
9 disputes went to Judge van Keulen, and she denied plaintiffs'
10 request through the special master process --

11 **THE COURT:** Did you make the argument that the
12 non-public source code was not relevant, yes or no? Because
13 I'm going to go ask her.

14 So what was the argument made about the non-public source
15 code?

16 **MS. CRAWFORD:** Our position has long been that that
17 source -- that source code is not necessary for plaintiffs to
18 prove its case or the allegations -- sorry -- or our defenses
19 in this case.

20 We are only seeking to use source code if plaintiffs
21 maintain their position that a log does something that the
22 source code proves it technically cannot do. That is the
23 limited purpose for which we are interested in using any
24 references to the source code, to directly rebut an expert's
25 contention --

1 **THE COURT:** And who would do that? Who would make --
2 who would testify? Obviously not you, so who?

3 **MS. CRAWFORD:** Our expert, Dr. Psounis, who reviewed
4 the code.

5 **THE COURT:** And where is that? Where is the statement
6 that you want to use in the report? Where have you disclosed
7 that?

8 **MS. CRAWFORD:** I can get you specific references,
9 Your Honor. There are several reports where this specific log
10 and the source code is -- has been evaluated by Dr. Psounis,
11 and he's rebutting Dr. Hochman's opinions with respect to this
12 issue of joinability.

13 **THE COURT:** So where is it?

14 **MS. CRAWFORD:** It's his rebuttal to this very report
15 that Mr. McGee has been talking about it --

16 **THE COURT:** I need -- where in my documents is it? So
17 Volume 4?

18 **MS. CRAWFORD:** Just give me one second, Your Honor, to
19 call that up.

20 **THE COURT:** You cannot be talking outside of a mic.

21 I have Volume 4, which has his reports at Tabs 25 and 26.

22 **MR. MCGEE:** Your Honor, I believe it's 26 -- is the
23 tab. It's the August 30th, 2023, rebuttal report of Google's
24 expert, Konstantinos Psounis.

25 **THE COURT:** All right. What lines? And has he been

1 deposed on this topic?

2 **MS. CRAWFORD:** Yes, he has, Your Honor.

3 **MR. MCGEE:** I apologize, Your Honor?

4 **THE COURT:** Was he deposed on this issue?

5 **MR. MCGEE:** I deposed him on October 9th or
6 October 10th of this year, Your Honor, and it was after we,
7 under the exchange schedule, had to author this motion in
8 limine.

9 **MS. CRAWFORD:** And I defended that deposition,
10 Your Honor. It went a full seven hours. This was the subject,
11 among other things, of the deposition.

12 **MR. MCGEE:** I believe Mr. Spilly defended the
13 deposition.

14 **MS. CRAWFORD:** Mr. Spilly and I defended the
15 deposition, Ryan.

16 **THE COURT:** Okay. While you're finding it, we're
17 going to go ahead and take a -- Pam we've been on the record
18 for two-and-a-half hours. We will take a break for 15 minutes.
19 Okay. Pam needs a break. I'm going sit here. I want you to
20 get me the paragraphs.

21 **MS. CRAWFORD:** I will.

22 **THE COURT:** Take a break. That's fine.

23 (Recess taken at 11:25 a.m.)

24 (Proceedings resumed at 11:38 a.m.)

25 **THE COURT:** Okay. I have from the defendants the

1 references to the paragraphs in the Psounis --

2 **MS. CRAWFORD:** Yes. Dr. Psounis.

3 **THE COURT:** -- report. So paragraphs 50 through 61,
4 which seem to relate to specifically the -- well, you tell me.

5 He says he examined source code with the specific file
6 name, and that is the file name that we're talking about.

7 **MR. MCGEE:** I believe it was SOQS mapper dot sc or dot
8 cc.

9 **THE COURT:** I didn't know if that was confidential or
10 not.

11 **MS. CRAWFORD:** I believe it is.

12 **THE COURT:** It's not highlighted in here.

13 **MS. CRAWFORD:** Perhaps not in --

14 **THE COURT:** Okay.

15 **MS. CRAWFORD:** -- that copy.

16 **THE COURT:** It's -- well, I can strike it.

17 Everybody should understand, you asked me to have the
18 webinar on. The webinar is on, and that means that this --
19 anybody who's listening in is listening in.

20 **MS. CRAWFORD:** If helpful, Your Honor, we can just
21 refer to it as the SOQS log going forward.

22 **THE COURT:** How do you spell that?

23 **MS. CRAWFORD:** S-O-Q-S.

24 **THE COURT:** Okay. All right. I've looked at it
25 response.

1 So they produced it. They produced it late.

2 **MR. MCGEE:** Yes, Your Honor. They -- I think late
3 would be generous. You know --

4 **THE COURT:** They argue that it doesn't prove anything.
5 You have an expert that says it proves something. They have an
6 expert that says it doesn't.

7 **MR. MCGEE:** I think, to clarify, our expert did not
8 look at the source code.

9 **THE COURT:** Your expert's assistant looked at the
10 source code.

11 **MR. MCGEE:** Correct. The import of it is that the
12 source code writes authenticated and unauthenticated
13 information data --

14 **THE COURT:** Let me --

15 **MR. MCGEE:** Signed in and signed out, Judge. I'm
16 sorry.

17 **THE COURT:** As I understand it, you -- Google only
18 wants to be able to have the -- Dr. Psounis testify as a
19 rebuttal to something that plaintiffs propose.

20 **MS. CRAWFORD:** That is correct, Your Honor.

21 **THE COURT:** So no affirmative opinion, only as a
22 rebuttal opinion.

23 **MS. CRAWFORD:** It is a rebuttal opinion of his.

24 **THE COURT:** Okay. So what is it that you want to
25 affirmatively have testimony on to which this would rebut?

1 **MR. MCGEE:** Mr. Hochman would testify that based on
2 his review of Google's documents and the special master
3 process, again, where this information was not disclosed and it
4 had not been disclosed at that point, that Google does join
5 signed in and signed out data in the same place.

6 **THE COURT:** And you don't want to reference the
7 non-public data at all, the non-public source code?

8 **MR. MCGEE:** I think that's correct, Your Honor, yes.

9 **THE COURT:** So if they're not offering the non-public
10 source code, you have nothing to rebut.

11 **MS. CRAWFORD:** That's precisely the point, Your Honor.
12 Google would be unduly prejudiced in its ability to rebut that
13 argument without our ability to reference the source code.

14 **THE COURT:** How could you be unduly prejudiced? You
15 never disclosed this in the first instance.

16 **MS. CRAWFORD:** Plaintiffs did not -- our opposition
17 makes this clear. Plaintiffs, throughout the course of
18 discovery, requested several different logs, not this
19 particular log, Your Honor.

20 **THE COURT:** How I do know you just weren't hiding all
21 of this, and here at the last minute, you want -- you want to
22 use something that -- that you withheld for years?

23 **MS. CRAWFORD:** This wasn't -- so our opposition brief
24 specifically lays out the different types of source code that
25 plaintiffs requested. Judge van Keulen denied their request on

1 the basis that their request for source code was overbroad.

2 This disclosure during the sanctions process is one that
3 plaintiffs were able to review the source code. They reviewed
4 the source code. They deposed our expert --

5 **THE COURT:** But this is during a sanctions process.
6 That means that you weren't doing something.

7 **MR. MCGEE:** And, Your Honor, if I may -- apologies.

8 **THE COURT:** You were being sanctioned for failure to
9 disclose, so how were you complying with your discovery
10 obligations if you were being sanctioned?

11 **MS. CRAWFORD:** I think those are separate issues, Your
12 Honor. The source code that we're referencing here and the log
13 that we're describing was not sought by plaintiffs during the
14 course of discovery. Our brief lays out very clearly Judge
15 van Keulen denied their request for -- and it was an overbroad
16 one for several different types of source code related to
17 Chrome specifically.

18 This is a separate log, again, one that plaintiffs have
19 had an opportunity to examine. They deposed our expert for
20 seven hours about this log. They simply don't like his
21 testimony -- our expert's testimony that conclusively shows
22 their assertions about joinability as to this log are false.

23 And, again, we would only be seeking to introduce this to
24 rebut any assertion by their expert, Mr. Hochman, that Google
25 does, in fact, join data from regular browsing mode sessions

1 and private mode sessions in the context of this single log.
2 That is the limited purpose for which this source code would be
3 referenced, purely in rebuttal.

4 **THE COURT:** Well, it's not purely in rebuttal, it
5 sounds like, because they're not -- they're not seeking to
6 opine on the -- on the source code. You're using source
7 code -- you're using additional source code to prove a rebuttal
8 point.

9 **MS. CRAWFORD:** As to how the log functions, yes,
10 Your Honor. The logic of the log itself, which the source code
11 is reflective of, would definitively disprove the assertion
12 Mr. Hochman has made.

13 The logic for the log that Mr. Hochman is opining on
14 requires reference to the underlying source code because it
15 contains the programmatic logic for that log.

16 **THE COURT:** What is Hochman's perspective on
17 paragraphs 50 to 61?

18 **MR. MCGEE:** Your Honor, with respect to how the source
19 code works, I want to be very clear. Mr. Hochman reviewed what
20 Dr. Psounis put in his report, and Mr. Zervas confirmed in his
21 deposition that this source code only controls how the data
22 goes into the log, not what happens with it afterward, and only
23 this very specific -- specific one log.

24 So Mr. Hochman doesn't have the benefit of looking at the
25 entire Google system, all of the billions of lines of source

1 code, just the ones that Google identified in response to the
2 second sanctions, and that is what I wanted to point out. It
3 was not in response to a first sanctions bid on behalf of the
4 plaintiffs. We successfully secured sanctions. Judge
5 van Keulen wrote her order on May 20th of 2022, and it ordered
6 Google to certify that these bids did not exist in any other
7 logs, and as part of that process and part of our continued
8 efforts, Google then revealed this log in a subsequent list.

9 So to your point about hiding and whether they were being
10 forthright with discovery, I think the record is clear that
11 they were not, and it was only at our continued insistence that
12 they provided this subsequent source. And then when we went to
13 the sanctions hearing on March 2nd of 2023, did their
14 Dr. Psounis review this source code to rebut that, according to
15 Google's syntax or Google's vocabulary, authenticate or
16 signed-in data and unauthenticated data, potentially from the
17 same person, goes into the same log, but it's just not written
18 on the same line.

19 And so now Google wants to introduce this, what they
20 propose is a rebuttal. They want to have -- I know,
21 Your Honor, you've looked at paragraphs 50 through 61. They
22 said there's 14,000 lines of code. But they want to have
23 Dr. Psounis, you know, succinctly explain that he reviewed all
24 of this and comes to the simple conclusion that Google never
25 joins any data. We haven't had the benefit of that discovery.

1 We didn't have the benefit of any of this source code when we
2 were reviewing custodians, when we were looking to depose
3 people, when we were deposing people who Google has now listed
4 as sponsoring witnesses for this exact source code, including
5 Dr. Berntson.

6 So now we have to wait and see what Google is going to do
7 with the source code. It is patently unfair. It is pure 403.

8 **MS. CRAWFORD:** Your Honor, if I may?

9 **THE COURT:** You may.

10 **MS. CRAWFORD:** Mr. McGee references Google's position
11 on source code. It is true that plaintiffs propounded
12 extremely overbroad requests for source code during the course
13 of discovery. That was briefed during discovery. They
14 identified the types of logs they were interested in. They
15 asked many different times for certain logs. Judge van Keulen
16 evaluated their arguments and ultimately denied their request
17 for an overbroad sampling of source code from Google's system.

18 This specific log, as soon as Google was made aware of it,
19 it was disclosed. Google has already been sanctioned, and the
20 prejudice through the order has been cured.

21 Plaintiffs were given an opportunity to review the
22 underlying source code. For the same log, the one log that is
23 in dispute now, plaintiffs have had a chance to look at the
24 source code and depose Google's expert on it and what the log
25 logic does and does not show, whether joining does or does not

1 exist in the form Dr. Hochman contends.

2 The testimony from Dr. Psounis on this point could not be
3 clearer, Your Honor. There is no open question or outstanding
4 issue as to whether Dr. Psounis has reviewed the source code,
5 whether plaintiffs have had an opportunity to review the source
6 code, and --

7 **THE COURT:** Where does it say in here -- all this says
8 in paragraph 50 is what he -- is that he examined a particular
9 source code file. It doesn't identify or indicate that he's
10 looked at all files relating to the joining of authenticated or
11 unauthenticated data.

12 **MS. CRAWFORD:** This is the log that plaintiff contends
13 contains the joined non-private browsing data or regular-mode
14 data and private browsing data. That is the assertion from
15 their expert, Mr. Hochman, which is why we are limiting our
16 discussion to this particular log.

17 **THE COURT:** Where is Hochman's -- in what paragraphs
18 of his report does he reference the SOQS log?

19 **MR. MCGEE:** I apologize, Your Honor. I'm pulling that
20 up.

21 As I'm going back, I think it was paragraph 43. It was
22 the log that we were talking about.

23 **THE COURT:** Is it the same log that's referenced in
24 paragraph 50?

25 **MR. MCGEE:** Sorry. One moment, Your Honor.

1 **MS. CRAWFORD:** Yes, Your Honor.

2 **MR. MCGEE:** I believe so. Yes, Judge.

3 **THE COURT:** So you want to give your expert -- your
4 expert wants to give his view of what the SOQS log means, and
5 your motion seeks to preclude Google from having their expert
6 provide an alternative interpretation?

7 **MR. MCGEE:** I think, Judge, that their expert would
8 provide -- again, this vocabulary issue -- is Mr. Hochman is
9 going to say is joined because authenticated and
10 unauthenticated data are in the same place. Their expert is
11 going to say it's not on the same lines.

12 **THE COURT:** Okay. So what's the problem?

13 **MR. MCGEE:** Well, they're now going to bolster that
14 with the non-public source code --

15 **THE COURT:** Hold on. That's -- I want to make sure
16 that I'm understanding the -- the code that is -- that is being
17 referenced. So there is a source code file called, for our
18 purposes, the SOQS log; correct?

19 **MR. MAO:** Yes, Your Honor. I'm standing in because I
20 handled this from the beginning to the end.

21 **THE COURT:** That's fine.

22 So the SOQS log, Hochman has an opinion about what it
23 does, and that's in paragraph 43 of his report.

24 **MR. MAO:** We -- we -- that is correct, Your Honor, but
25 we felt like we had to because it was proffered for the first

1 time after repeatedly being denied that since 2021. I have a
2 record on this.

3 **THE COURT:** Let me ask this question.

4 **MR. MAO:** Yes.

5 **THE COURT:** Can the -- can the -- I don't know what
6 you mean by you felt like you had to. This is -- as I
7 understand it, paragraphs 50 through 61 is a rebuttal to
8 paragraph 43.

9 **MR. MAO:** If I may just take a step back, it will
10 literally just take a minute.

11 We asked at the onset, okay, whether or not they joined
12 data, and the representation from Google was that they did not.

13 When counsel is referring to our requesting -- not having
14 requested specific logs, it needs to be clear that the log at
15 issue was never disclosed at that point until after the
16 sanctions.

17 **THE COURT:** But as I understand it, their position
18 remains consistent, that is, that even though you have this log
19 and it has been produced, it is still their position that it is
20 not joined, that the data is not joined. That's still their
21 position.

22 **MR. MAO:** That's right, Your Honor. But that's not a
23 rebuttal. This is actually an affirmative proof they're trying
24 to use to offer to show that it's not joined. It's selective.

25 **THE COURT:** It's a different interpretation of the

1 log.

2 **MR. MAO:** But, Your Honor, if that is throughout the
3 entire system, why didn't they produce them in the first place
4 when we asked for the source code? They cannot -- they cannot
5 selectively pick --

6 **THE COURT:** Why does -- how --

7 **MR. MAO:** It --

8 **THE COURT:** It's just -- I --

9 **MR. MAO:** I understand.

10 **THE COURT:** Big picture.

11 **MR. MAO:** Yes, Your Honor.

12 **THE COURT:** If the SOQS log does not join, from their
13 perspective, how is it evidence of code that joins?

14 **MR. BOIES:** Can I try, Your Honor?

15 **THE COURT:** You can. I don't think I'm that dumb.

16 **MR. BOIES:** You're not. You're not at all. And I
17 think we're -- we're being confusing, I think.

18 Our expert says that this log demonstrates joining.

19 **THE COURT:** Right.

20 **MR. BOIES:** They say it doesn't, and I agree with
21 Your Honor, that that's rebuttal. Okay?

22 Our expert, in reaching that conclusion, did not rely on
23 the source code because we didn't have it, and we didn't have
24 access to it. Their expert now, in addition to rebutting our
25 expert based on what we had available, says, "I want" --

1 **THE COURT:** So this source code file, the SOQS log, is
2 a public file?

3 **MR. MAO:** No, Your Honor.

4 **MR. BOIES:** No. It's not a public file. What we
5 had -- what our expert did was without the source code, because
6 we didn't have the source code, did an analysis that leads our
7 expert to conclude that they do join the -- they do join the
8 data.

9 Their expert disagrees, and to the extent that their
10 expert is relying on stuff that we had access to in terms of
11 the discovery, that's fair game.

12 What their expert is now doing is saying, *I've looked at*
13 *the source code and that source code*, which we did not have
14 access to during the discovery period, *demonstrates that I'm*
15 *right and that source code -- that is not all the source code.*
16 *The -- what we have is the source code that --*

17 **THE COURT:** What did your expert's position -- if your
18 expert's position with respect to the joining, as identified in
19 the logs, isn't based on the SOQS log, what is it based on?

20 **MR. MAO:** It's based on -- sorry, Your Honor. Mr. Mao
21 here.

22 It's based on the fact that when you look at the data in
23 the log itself, the output. Without having to resort to the
24 algorithm or the source code, you can see the unauthenticated
25 and authenticated sitting together in the same log.

1 **THE COURT:** I see.

2 **MR. MAO:** And then Google is coming around and saying,
3 *Well, you haven't seen the source code.* Our response is, well,
4 back in November 4, 2021, Your Honor -- this is on the record
5 in front of the magistrate judge -- I myself specifically asked
6 opposing counsel "with regard" -- and as I'm quoting now.

7 "With regard to Google's allegation that they don't
8 join" -- and I note, Your Honor, that some they don't join,
9 some could be setting that aside, the fact that they do, under
10 this service, we believe that's something we can prove and
11 shift the burden to Google in terms of documentation and then
12 it's incumbent on Google to prove that they don't do that.

13 How are they going to do that if they don't prove this is
14 the source code, your Honor, because the one thing that should
15 be undisputed in terms of what the code does is being able to
16 inspect to see if it does A or it does not do A.

17 This is November 4th, 2021, pages 23 to 24. Just so you
18 know, Your Honor, I pointed this out to opposing counsel before
19 we came up to make additional representations during the
20 recess. Okay.

21 So as you can see, Your Honor, we asked them to do that
22 almost three years ago now. For them to --

23 **THE COURT:** Okay.

24 **MR. MAO:** I made my point.

25 And that illustrates, Your Honor, that we did not have to

1 rely on the source code; instead, they were trying to use that
2 affirmatively.

3 **THE COURT:** I see.

4 **MS. CRAWFORD:** Your Honor, if I may, Your Honor, just
5 to correct the record, Mr. Boies referenced plaintiffs not
6 having access to the source code. I think the record is clear
7 and maybe he ultimately clarified that he was referring to the
8 during the course of discovery, but the log at issue has been
9 examined by plaintiffs. They've looked at it.

10 **THE COURT:** Yeah. But that's all recent and as a
11 result of sanctions orders.

12 Why didn't -- why didn't -- why wasn't the SOQS log
13 produced in 2021 after the December-- after the November 4th
14 hearing?

15 **MS. CRAWFORD:** My understanding is that we were not
16 aware of it, Your Honor, and as soon as we became --

17 **THE COURT:** Who is "we"? The lawyers or Google?

18 **MS. CRAWFORD:** I would have to confer --

19 **THE COURT:** Google is the party, not the lawyers. So
20 you may not have been aware of it, but that doesn't mean that
21 Google is not aware of it. You can't say that Google is not
22 aware of its own source code.

23 **MR. BROOME:** No. We can't make that statement
24 obviously, Your Honor.

25 Google has thousands of logs and thousands of employees,

1 and in this process what happened is we -- we belatedly
2 produced these logs. We located them, we identified them, and
3 then we produced them.

4 **THE COURT:** Fifteen months later.

5 **MR. BROOME:** I agree it was late, and we were
6 sanctioned for that. Judge van --

7 **THE COURT:** So you are all clear that in November of
8 '21, the issue was -- the specific issue was raised about the
9 specific source code which would be necessary and that -- or
10 any source code to address this issue, which is a specific
11 issue, and that wasn't produced until 2023.

12 **MR. BROOME:** No. I don't believe that's accurate,
13 Your Honor. I think we're talking about just one particular
14 log here of many that were -- many logs were produced, and
15 these particular logs were produced late.

16 There were two sanctions proceedings and two sanctions
17 orders. The -- the -- this log was identified. Then we had
18 some discovery on it. We had expert declarations on it. Our
19 expert got to look at the source code for this particular log
20 and theirs did. Then we had further sanctions proceedings, and
21 Judge van Keulen looked at the entire record, and she said,
22 *What is the appropriate sanction to cure the prejudice suffered*
23 *by plaintiffs?* She then issued an order or -- she amended her
24 prior sanctions order to address this very prejudice.

25 And so from our perspective, we agree that -- we

1 acknowledge that these logs were produced late, but we've been
2 sanctioned for them, and we can live with that.

3 But this would go further because the point of the trial
4 is to get to the truth, and we think that what plaintiffs are
5 arguing is extremely misleading. And if we are not allowed --
6 if our expert is not allowed to respond by pointing to how the
7 log at issue is actually designed to keep this data segregated,
8 that would be unduly prejudicial.

9 **THE COURT:** I understand.

10 Anything else and we'll move on?

11 **MR. MCGEE:** Your Honor, just -- I have nothing
12 further, Judge.

13 **THE COURT:** All right.

14 The Motion in Limine No. 2.

15 **THE COURT:** All right. This goes to the consent
16 issue, which we started addressing earlier.

17 **MS. BONN:** Yes, Your Honor.

18 **THE COURT:** So consent, again -- I don't -- the fact
19 that it might be relevant to injunctive relief isn't relevant
20 to a jury trial, so that's one issue.

21 Does everybody agree that just because it's relevant --

22 (Whereupon, the Zoom proceedings froze)

23 **THE COURT:** And I have -- so I have up until "does
24 everybody" -- I'm at line 24. Let's see if it goes.

25 Okay. So the issue of consent is relevant to the

1 individual claims; correct?

2 **MS. BONN:** Correct.

3 **THE COURT:** And if the issue of consent is relevant to
4 the individual claims, then express and/or implied is relevant.
5 So they're individual claims.

6 **MS. BONN:** Potentially. And what our issue is,
7 Your Honor --

8 **THE COURT:** You have asked me to exclude, quote, all
9 evidence and argument regarding implied consent at trial.
10 That's what you've asked.

11 **MS. BONN:** I want to correct that. What we're
12 asking -- look, I have no problem. If they want to show a
13 plaintiff a document and say, "I'm showing you an article.
14 Have you seen" --

15 **THE COURT:** I need to know --

16 **MS. BONN:** Yes.

17 **THE COURT:** I need to know a succinct statement of
18 what you're asking for.

19 **MS. BONN:** Material such as news articles or developer
20 tools that perhaps absent class members may have seen but these
21 plaintiffs didn't. That's really the issue.

22 I have no problem if Google wants to ask each plaintiff,
23 "Have you seen this article? Have you used a developer tool?
24 Did you know about this?" But then to say --

25 **THE COURT:** Well, if they don't have any foundation

1 for the question, it's a waste of time.

2 **MS. BONN:** Exactly. That's our point.

3 But our understanding is they want to say whether our
4 plaintiff saw it or not. We can be like it was out there in
5 the ether. Someone might have seen it. Some absent class
6 members might have seen it. That's the issue we have.

7 **THE COURT:** Okay. A response.

8 **MR. MARGOLIES:** The primary purpose for which we would
9 want this evidence before a jury is exactly what we've just
10 discussed, to show it to plaintiffs, to confirm whether or not
11 they've seen it --

12 **THE COURT:** You -- so if there is a news article and
13 you show that news article to a plaintiff and ask them whether
14 they recognize it, and the answer to the question is no, the
15 examination is over and the exhibit does not come in, because
16 there is no foundation that has been laid for the exhibit to
17 come in, plus it's hearsay.

18 So you'd have to address that, in any event. But you
19 don't get to just say because it's in the ether, it's
20 admitted.

21 **MR. MARGOLIES:** Understood, Your Honor.

22 **THE COURT:** Okay. So what's the issue?

23 **MS. BONN:** No remaining issue from our perspective.

24 **THE COURT:** Why do I have the motion then?

25 **MS. BONN:** Because our understanding is they still

1 wanted to put it out there as it's in the ether. Our
2 understanding is regardless of whether a plaintiff had seen
3 it --

4 **THE COURT:** The rules of evidence apply.

5 **MS. BONN:** Thank you.

6 **MR. MARGOLIES:** Thank you, Your Honor.

7 **THE COURT:** But the motion is -- is denied because as
8 it stands, it says it seeks to exclude all evidence of implied
9 consent, which is inappropriate.

10 **MS. BONN:** Correct. And we apologize to the extent
11 that was not clear, Your Honor. Thank you.

12 **THE COURT:** No. 3.

13 **MR. REBLITZ-RICHARDSON:** For plaintiffs, Beko
14 Reblitz-Richardson.

15 **MR. BROOME:** For Google, Stephen Broome.

16 **THE COURT:** Okay.

17 And I don't, just so that you know, Pam, I don't have
18 realtime. So -- okay. I missed your name.

19 **MR. REBLITZ-RICHARDSON:** Reblitz-Richardson is the
20 last name.

21 **THE COURT:** Okay. Thank you.

22 Okay. No. 3. So no one is going to talk about the Court.

23 **MR. BROOME:** We have made that clear in our brief,
24 Your Honor. We will stipulate that we have no -- I think we
25 already did stipulate that we have no intentions of bringing

1 the Court into this.

2 **THE COURT:** So that's granted.

3 No one is going to attack the lawyers for what the lawyers
4 do. It's granted as to the lawyers.

5 With respect to plaintiffs' experts, I mean, any witness
6 who talks -- who testifies, they're fair game. I mean, look, I
7 had Tim Sweeney who admitted to using an iPhone and he was
8 suing Apple. It's fair game.

9 **MR. REBLITZ-RICHARDSON:** We understand, Your Honor.
10 We -- we moved because we thought it would be a distraction,
11 but we understand the Court's direction.

12 **THE COURT:** Okay. So anything else left in this one?

13 **MR. BROOME:** Your Honor, I just -- with respect to the
14 lawyers, I understand your position, but we do think it's
15 fundamentally unfair for the lawyers to be standing up in front
16 of the jury, pounding the lectern saying, "Google is engaged in
17 unlawful voyeurism and then at the same time using these exact
18 same services that they claim are improperly sending the data
19 to --

20 **THE COURT:** You know, we all do things that have
21 risks.

22 **MR. BROOME:** Yes, but those risks --

23 **THE COURT:** It's the nature of the game.

24 **MR. BROOME:** But those risks should be exposed here.

25 **THE COURT:** I'm not having you attack the lawyers.

1 I'm not going to to let them attack you and you're not going to
2 attack them.

3 **MR. BROOME:** Understood.

4 **THE COURT:** Granted in part, denied in part.

5 Next one, MIL 4.

6 **MR. SILA:** This is Ryan Sila for the plaintiffs.

7 **MR. BROOME:** And, again, Stephen Broome for Google.

8 **THE COURT:** Okay. Okay. This is a similar kind of
9 thing. So plaintiffs' continued use of the browsing mode. It
10 is what it is. They're using it, then jury is entitled to know
11 that they're using it.

12 **MR. SILA:** Understood, Your Honor. And just to
13 clarify, I think really what we're worried about is arguments
14 of the continued use of private browsing modes undermines the
15 merits of plaintiffs' claims for monetary or injunctive relief.

16 **MR. BROOME:** I could stipulate that we do definitely
17 intend to make those arguments.

18 **THE COURT:** I'm sure you do.

19 Denied. I mean it's -- it is -- it is -- it is both the
20 reason why -- why attacking some -- an entity like Google that
21 is ubiquitous and ever present is -- you know, in some ways,
22 it's hard to escape. It cuts both ways. And good trial
23 lawyers can turn that against the other side. You just have to
24 figure out how to do it. That's what good trial lawyers do.

25 It's denied.

1 **MR. BROOME:** Thank you, Your Honor.

2 **THE COURT:** No. 5 -- No. 5 all resolved right so
3 that's withdrawn?

4 **MR. BROOME:** Yes, Your Honor.

5 **THE COURT:** I need a "yes" from the plaintiffs. Mr.--
6 all right. Mr. Boies says "yes."

7 All right Google's No. 1. Again, I think I already
8 addressed this. No one talks about what the Court is doing.
9 So it is granted without prejudice to revisiting in a very
10 specific instance, if necessary, where I can micromanage how it
11 comes in.

12 No. 2, all right. There are a couple of problems with
13 this. No. 2 is really three motions. You've got motions to
14 exclude three different sets of documents, all of which haven't
15 even been discussed. I would just -- I would just deny it on
16 the fact that it's not -- it was procedurally improper, but
17 let's see what we can do with it.

18 You have 52 documents, 52 exhibits of which you attach a
19 list. I don't even have them so I don't know how I'm supposed
20 to deal with it given that you didn't give them to me.

21 **MS. TREBICKA:** We can cure that, Your Honor.

22 **THE COURT:** It's a little late.

23 **MS. TREBICKA:** We can cure it by the end of the day.

24 **THE COURT:** We are here right now.

25 **MS. TREBICKA:** Understood, Your Honor.

1 **THE COURT:** And I need names for the record.

2 **MR. SILA:** This is Ryan Sila again for the plaintiffs.

3 **THE COURT:** I have Ms. Trebicka, who --

4 **MS. TREBICKA:** Yes, Your Honor. Viola Trebicka for
5 Google.

6 **THE COURT:** All right.

7 So on the issue of damages, what are the individuals'
8 damages? And do you have an expert who's opining on unjust
9 enrichment?

10 **MR. SILA:** We do, Your Honor. We have a damages
11 expert who will be offering an opinion as to the individual
12 plaintiffs' damages in the form of a market-based measure. I'm
13 sorry. I don't have the exact number off the top of my head.

14 **THE COURT:** Who is the expert?

15 **MR. SILA:** Michael Lasinski.

16 **THE COURT:** Michael --

17 **MR. SILA:** Michael Lasinski, L-A-S-I-N-S-K-I.

18 His opinions were the subject of a previous *Daubert* that
19 Your Honor denied in connection with the class cert order.

20 **THE COURT:** Okay. So you have his opinion.

21 The 52 exhibits that are referenced but not discussed,
22 according to the plaintiffs, these not only -- focus on other
23 issues regarding Google's misconduct, not just specific to
24 damages. I can't tell because no one gave me the documents.

25 So I'm not exactly sure -- you're moving to exclude all

1 evidence and argument regarding classwide damages numbers.

2 Is there an objection to that? Class damages isn't
3 relevant here.

4 **MR. SILA:** There is, Your Honor. And to be clear,
5 we're not seeking classwide damages for, but for purposes of
6 our privacy tort claims, one of the elements is whether the
7 conduct is highly offensive and the amount of injury caused by
8 Google's practice of collecting private browsing data, and the
9 amount of Google's profit that it earned from doing so is
10 relevant to the offensiveness inquiry, to the extent of the
11 intrusion, to Google's motives and objectives, that kind of
12 thing.

13 **THE COURT:** Okay. How are the methodologies, inputs,
14 and financials relevant to that?

15 **MR. SILA:** So those really aren't, but the
16 methodologies that Mr. Lasinski uses to calculate individual's
17 unjust enrichment are the same inputs, methodologies, and
18 financial information. It kind of all flows down -- it's kind
19 of a top-down analysis, so for those reasons, we think those
20 pieces of information, which aren't clearly described in the
21 motion in the first place, should not be excluded.

22 **THE COURT:** Which documents specifically refer to this
23 first category?

24 **MS. TREBICKA:** Your Honor, so what we're -- can I back
25 up and just respond to a couple of things opposing counsel

1 said?

2 Yes, Your Honor. The documents listed in Mr. Fortenbery's
3 declaration are documents that contain classwide damages
4 financials or numbers. These are hundred-million-dollar
5 numbers or billion-dollar numbers. Those are the references
6 that we're trying to exclude.

7 We can have annotated versions of those to Your Honor so
8 that you can review, but we think that this outcome is very
9 much consistent with Your Honor's prior ruling that the trial
10 will be bifurcated, that punitive damages and financials
11 related to punitive damages will be dealt with in a separate
12 phase of the trial.

13 Again, it's a technicality. I apologize that we cannot
14 submit the actual documents, but we can cure that by the end of
15 the day.

16 **MR. SILA:** If I can respond just on the punitive
17 damages point, Your Honor.

18 We're certainly not seeking to introduce in the initial
19 phase of the trial Google -- evidence of Google's total
20 financial revenues. That's not -- we're not offering that for
21 purposes of trying to prove punitives in the first phase or
22 anything like that.

23 Really what we're trying to do is introduce the evidence,
24 both to show that Google's conduct was highly offensive and to
25 prove up our unjust enrichment calculations.

1 **MS. TREBICKA:** May I respond, your Honor?

2 **THE COURT:** You can, because you're seeking to exclude
3 evidence of one of their claims that is still in the case.

4 **MS. TREBICKA:** No, Your Honor.

5 First off, the documents that we have highlighted here --

6 **THE COURT:** I thought that the unjust enrichment was
7 still in the case. Is --

8 **MR. SILA:** It is.

9 **MS. TREBICKA:** It's not a claim, Your Honor. It's a
10 remedy. It's a damages remedy.

11 **THE COURT:** Isn't it still in the case?

12 **MS. TREBICKA:** As a remedy, it is. We don't believe
13 that it applies to any of the claims. It is a damages theory
14 that we dispute is -- is relevant to any of their claims.

15 But separately from that, Your Honor --

16 **THE COURT:** Where is the motion on unjust enrichment
17 being irrelevant to the trial? Where is that motion?

18 **MS. TREBICKA:** Your Honor, that is something that we
19 are prepared to discuss in the context of the jury
20 instructions. We have briefed that issue in the jury
21 instruction document.

22 **THE COURT:** Another -- the two of you -- another
23 back-door approach to getting another issue briefed.

24 **MS. TREBICKA:** Your Honor, may I just address the
25 issue here, though, which is very specific to large dollar

1 values --

2 **THE COURT:** Do you not -- what is Google's worth these
3 days? What is Google's worth these days? Billions?

4 **MS. TREBICKA:** I don't know, Your Honor, but it's a
5 public -- it's a matter of public record.

6 **THE COURT:** Exactly. You think that they don't know
7 that it is -- that this company makes billions of dollars?

8 **MS. TREBICKA:** The issue is different, Your Honor,
9 though. It's not about the trillion-dollar net worth or
10 whatever it is. It's about them trying to use documents and
11 numbers that specifically relate to their claimed harm to the
12 class. And they plan to use those documents that --

13 **THE COURT:** Well, again --

14 **MS. TREBICKA:** The claimed harm to the class --

15 **THE COURT:** This was filed October 17th, and you make
16 an argument and I see nothing attached.

17 **MS. TREBICKA:** Your Honor, with respect to the
18 admitted -- exhibits admitted, we apologize. It was an
19 oversight, and as I said, we can cure that by the end of the
20 day.

21 **THE COURT:** Do you not understand we're here right
22 now? It's -- this isn't the only case I have. I have hundreds
23 of cases. This is the time that I set aside to deal with this
24 case, and I prepped all of this stuff before walking in here.

25 **MS. TREBICKA:** Your Honor, however, that does not

1 detract from the main point of that first section of the brief,
2 which is that these are eye-popping numbers that relate to the
3 class.

4 **THE COURT:** So -- all right. Somebody give me --
5 somebody give me one example --

6 **MS. TREBICKA:** Yes, Your Honor.

7 **THE COURT:** -- of what you're talking about.

8 **MS. TREBICKA:** I can give you an example, Your Honor.
9 I apologize that the actual numbers are sealed --

10 **THE COURT:** I need --

11 **MS. TREBICKA:** I can --

12 **THE COURT:** And I need to see something. Can someone
13 send me -- give me a document, anything?

14 **MS. TREBICKA:** Yes.

15 **MR. SILA:** Your Honor, these numbers are going to be
16 found in Mr. Lasinski's expert report which is Tab 15 of Volume
17 2 of your binder.

18 **THE COURT:** What page?

19 **MR. SILA:** Just a moment. I think probably the best
20 place to look is going to be -- well, for one such example,
21 Figure 71, which is on page 78.

22 **THE COURT:** Okay. I don't anticipate having -- well,
23 I want to come back to this one.

24 **MR. SILA:** If I may -- just one moment about the
25 relevance of this figure, it might be helpful --

1 **THE COURT:** It's not.

2 **MR. SILA:** Okay. Thank you.

3 **THE COURT:** And -- yeah. I'm not prepared to rule on
4 this.

5 Next one, MIL 3.

6 **MR. FRAWLEY:** Alexander Frawley for the plaintiffs.

7 **MS. CRAWFORD:** Jomaire Crawford for Google.

8 **THE COURT:** Okay. Another 104 exhibits, and actually,
9 Mr. Beko [sic], my apologies. This is the one that was put
10 into three buckets that weren't discussed. This one, though,
11 too, I don't have any of the documents.

12 So, you're seeking to exclude three different things, all
13 in the context of one motion, so pick one. The other two are
14 deemed withdrawn. You need to follow the rules.

15 **MS. CRAWFORD:** Understood, Your Honor. And apologies
16 for that.

17 Of the three categories --

18 **THE COURT:** I don't need apologies. I need you all to
19 follow the rules.

20 **MS. CRAWFORD:** We will, Your Honor.

21 **THE COURT:** What are you withdrawing?

22 **MS. CRAWFORD:** Non-browser --

23 **THE COURT:** You have three different issues --

24 **MS. CRAWFORD:** Yes.

25 **THE COURT:** Litigation and regulations not at issue in

1 this litigation; non-browser applications or practices
2 expressly excluded from plaintiffs' allegations; and features
3 that Google considered but never implemented.

4 **MS. CRAWFORD:** We're looking to preserve the first
5 category, Your Honor, irrelevant foreign and domestic
6 investigations in litigation, and withdraw the other two,
7 non-browser products and signed-in users and features that were
8 never implemented.

9 **THE COURT:** Okay.

10 So what does other litigations and regulations have to do
11 with any of this?

12 **MR. FRAWLEY:** I think -- I'm not sure -- so this is --
13 hopefully only now we're talking about three exhibits on our
14 exhibit list. I don't think any of these documents, these
15 three exhibits, fit into that category. I can just tell that
16 you Exhibit 708 --

17 **THE COURT:** I don't know --

18 **MR. FRAWLEY:** Yeah. Sure, Your Honor. Well, I'll
19 just tell you that one of these exhibits --

20 **THE COURT:** I asked about the topic.

21 **MR. FRAWLEY:** Oh.

22 **THE COURT:** Why -- we are litigating this particular
23 case, which is already complicated enough. Why should there be
24 evidence of other litigation.

25 **MR. FRAWLEY:** I -- there might not -- arguably there

1 shouldn't be, but that's not what these documents they're
2 seeking to exclude are.

3 **THE COURT:** That's what the motion seeks to exclude.

4 **MR. FRAWLEY:** And consistent with your standing
5 overred, they haven't attached them, but they've said *these are*
6 *the three exhibits we're talking about*, and I don't think those
7 three exhibits are -- I don't know what is an accurate way to
8 describe those exhibits.

9 **THE COURT:** What are the exhibit numbers?

10 **MR. FRAWLEY:** So they say it's Exhibit 61, 380, and
11 708, and I can appreciate you don't have them.

12 **THE COURT:** 61 is what?

13 **MR. FRAWLEY:** That's an email among Google employees.
14 They're addressing some concerns that they have about Google's
15 retention of data, and they're doing so in the context of
16 thinking about the Chinese government. I don't believe there's
17 an investigation or a proceeding or anything like that.
18 They're just talking about what might happen to data that's
19 stored in Google's logs in the context of what the Chinese
20 government could do.

21 **THE COURT:** A response.

22 **MS. CRAWFORD:** Insofar as plaintiffs seek to --

23 **THE COURT:** 61. I want a response on 61.

24 **MS. CRAWFORD:** Yes.

25 Insofar as plaintiffs seek to argue using emails about

1 conversations that -- about Google data that applied to
2 non-U.S. users, so users that would be outside of the purported
3 class here, our view is that those documents, because they
4 reference extraterritorial users and perhaps regulations that
5 apply or govern the use of such data, is irrelevant and runs
6 the risk of jury confusion, among other things.

7 **THE COURT:** I am going to look at these documents and
8 that's -- this is your opportunity. That's all you want to say
9 on this one document, 61?

10 **MS. CRAWFORD:** Yes. That is an email chain, as
11 Mr. Frawley represented, discussing home for users located in
12 China. Again, to the extent there is argument about any
13 foreign investigation or regulations that govern the use of
14 Google data, user data, and that's what the email is describing
15 or discussing, those are the categories of both arguments and
16 documents that we will be seeking to exclude.

17 **THE COURT:** And the relevance is?

18 **MR. FRAWLEY:** For 61, Your Honor, at least two
19 reasons.

20 **THE COURT:** Yes.

21 **MR. FRAWLEY:** One is when we think about the
22 offensiveness of what's happening, that Google employees are
23 admitting that the data is stored in a way that it could be
24 used to harm users, and in this case, they were thinking about
25 the Chinese government, but we don't see why that wouldn't

1 apply to the United States government potentially or anybody
2 who got ahold of this kind of data. That's one reason.

3 And number two is this notion of joining and joinability.
4 I don't want to go too far into it. It's actually the next
5 motion, and you've heard a lot about it already.

6 But to the extent that employees are concerned about,
7 well, is this data that we're storing going to be tied to a
8 user, can it be tied, is it tied, and they're grappling with
9 these problems, it's --

10 **THE COURT:** How do you intend to get this document in?

11 **MR. FRAWLEY:** I actually, Your Honor, believe --
12 someone can correct me if I'm wrong -- but I believe
13 Mr. Lemoine is on this email chain, so he's potentially one
14 way. And I can't -- I'm sorry, Your Honor -- remember which
15 other sponsoring witnesses we put, but I believe Mr. Lemoine
16 was at least a sponsoring witness and there might be more.

17 **MS. CRAWFORD:** And if I may just add, Your Honor,
18 insofar as there is no nexus to U.S. users or U.S. laws that
19 would apply to again -- or govern the use of Google user data,
20 we contend that that would be extremely prejudicial.

21 **THE COURT:** Docket 38 -- or document 380?

22 **MR. FRAWLEY:** Should I start, Your Honor?

23 **THE COURT:** What's the relevance?

24 **MR. FRAWLEY:** Sure. This one I want to point you -- I
25 understand you're going to review them -- to one portion of

1 this document, which you don't have yet but hopefully you can
2 take a look at when you get it, which is that it's a disclosure
3 that Google is providing to website publishers, and, yes, this
4 document is focusing in general on the GDPR, so I understand
5 Google's argument that that's potentially irrelevant.

6 But Google is making a representation to website
7 publishers in this document that users have control over their
8 data. We think that's relevant to their website consent
9 argument because they've said that they're going to argue that
10 website were aware of and consented to Google's collection of
11 the at-issue data.

12 So we think any representation we made to websites that
13 users are, in fact --

14 **THE COURT:** Slow down.

15 **MR. FRAWLEY:** Sorry.

16 Any representation that Google makes to websites to the
17 effect of users have control, we think that -- we should be
18 allowed to use documents like that to rebut Google's argument
19 that the websites knew about this and consented.

20 **MS. CRAWFORD:** If I may, Your Honor?

21 **THE COURT:** Hold on.

22 Go ahead.

23 **MS. CRAWFORD:** Plaintiffs have identified over 850
24 exhibits on the joint exhibit list as it currently stands. The
25 relevance of this document, which on its face references and is

1 described as, quote, tools to help publishers comply with the
2 GDPR, there are several references in here to complying with
3 Europe's, quote, new general data protection regulation which
4 applies to users in the EEA and the UK, and it goes on to
5 continue to describing the GDPR.

6 Plaintiffs don't need this exhibit, which is focused on a
7 non-U.S. regulation, in order to make the point that
8 Mr. Frawley just articulated. Of the 850 exhibits that
9 plaintiffs seek to introduce and put on the joint exhibit list,
10 there are others that do exactly what Mr. Frawley described.
11 Therefore, this particular one, 7 -- 380, "tools to help
12 publishers comply with the GDPR," is unduly prejudicial and
13 risks confusing the jury or confusion of the issues because the
14 GDPR is not at issue in this case.

15 **THE COURT:** Any response?

16 **MR. FRAWLEY:** Your Honor, I think if -- and I'd have
17 to go back to our exhibit list to review, but to the extent
18 Google is suggesting that well, maybe we can agree that you,
19 you know, will stipulate to admitting this document that's an
20 exchange between Google and publishers because that's an
21 existing point that you want to make, I think we should be open
22 to that kind of conversation.

23 But off the top of my head, I unfortunately am not aware
24 of a substitute document where I could comfortably say I agree
25 we don't need this one.

1 **THE COURT:** Last one is 708.

2 **MR. FRAWLEY:** This one, Your Honor, I hope can be
3 easy, and the reason is because on our exhibit list, we put
4 this one in the bucket of the injunctive relief only part of
5 the case. So this -- this one, we would argue, would not be
6 going to the jury, and we might use it with Your Honor, and we
7 think that hopefully means we don't have to grapple with it
8 right now.

9 **MS. CRAWFORD:** We're fine deferring a resolution of
10 that particular exhibit until that later stage in the case,
11 Your Honor.

12 **THE COURT:** Okay.

13 Is there anything that needs to be said with respect to
14 the fourth motion in limine? I mean, is it anything beyond the
15 arguments with respect to what we were talking about before?

16 **MS. TREBICKA:** That's a great question, and I think it
17 really depends on, in part, the resolution to Plaintiffs'
18 Motion in Limine No. 1 because this is about joining of private
19 browsing data with users' identification.

20 **THE COURT:** Isn't that the whole point?

21 **MS. TREBICKA:** That is the whole point, Your Honor.

22 **THE COURT:** So why would I exclude the whole point --
23 one of the main points of the trial?

24 **MS. TREBICKA:** Your Honor, then we would submit to you
25 that at the very least, we be allowed to correct this --

1 **THE COURT:** Okay.

2 **MS. TREBICKA:** -- mistaken --

3 **THE COURT:** It sounds like it's the exact same issue
4 that we had a ton of argument on.

5 **MS. TREBICKA:** No disagreement there, Your Honor, but
6 this is another way to get at the issue of Google needing to be
7 allowed, for due process purposes, to refer to the source code
8 so that it can correct a misstatement.

9 **THE COURT:** You know, companies have to remember that
10 they have obligations, and I will go back and I will check, and
11 I'm checking with Judge van Keulen.

12 I had a company that failed to do what they were supposed
13 to do under the code. It was a class action trial. And at the
14 last minute, when they were getting ready for trial, they all
15 of a sudden had evidence to suggest that they were complying
16 with the law.

17 Case went to trial. The evidence was excluded, as it was
18 properly excluded for failure to disclose. And the jury
19 awarded statutory damages in the amount of \$278 million. It
20 was a TCPA case, of all kinds of cases. TCPA, \$278 million,
21 affirmed on appeal.

22 You have obligations.

23 **MR. FRAWLEY:** May I make one brief point, Your Honor,
24 about this one?

25 **THE COURT:** No.

1 Next motion, Google's last motion, for bifurcating
2 punitive damages. I already granted that.

3 **MS. TREBICKA:** Thank you, Your Honor.

4 **THE COURT:** All right.

5 Before I forget, I take it -- I do not need 50 boxes of
6 documents with all your exhibits. So tell me what you're
7 thinking in terms of examinations. Are you going to have
8 witness binders? Is that what you're going to do with the
9 exhibits that you're using with respect to each individual
10 witness? Is that the plan?

11 **MR. MAO:** Your Honor, if we may real quickly on the
12 last one, bifurcation, that motion was not entirely a
13 bifurcation motion. It was partially a motion to exclude
14 evidence as well. And it was wrapped up in the motion that you
15 previously heard on -- I think essentially -- I don't remember
16 the title of it but the financial condition. Okay? It
17 basically was the same motion rewrapped as a motion for
18 bifurcation.

19 So I just want to make sure that when you say you grant
20 it, you grant it as in a bifurcation but not necessarily the
21 evidentiary things that they've listed in that motion to be --

22 **THE COURT:** Let me check.

23 **MR. MCGEE:** And, Your Honor, this is Ryan McGee again.

24 We filed our opposition last night. I know that Google is
25 a bit delayed in filing that motion for bifurcation.

1 **THE COURT:** So I did not look at everything that was
2 filed last night.

3 **MR. MCGEE:** I understand, Your Honor. And I can
4 represent that we suggested an alternative that I believe is
5 what you articulated this morning.

6 **THE COURT:** Let me -- let me get the motion.

7 By the way, why was it filed so late, Mr. Shapiro?

8 **MR. SHAPIRO:** This was the other side's opposition
9 that was filed last night, Your Honor.

10 **THE COURT:** The motion was timely filed?

11 **MR. SHAPIRO:** I believe so, yes.

12 **MR. MCGEE:** We suggest no, Your Honor. And we point
13 out in our response that in your pretrial statement, you
14 require in Section H the parties to discuss bifurcation, and
15 that was not discussed by Google, and a month later they filed
16 their motion for bifurcation.

17 We have a physical copy --

18 **THE COURT:** Folks, I'm just pulling up your docket.

19 **MR. MCGEE:** I can give you a paper copy if it's
20 helpful, Judge.

21 **THE COURT:** Okay.

22 **MR. MCGEE:** May I approach?

23 **THE COURT:** No. Just give it to Mr. Cuenco.

24 **MR. SHAPIRO:** Your Honor, A, my understanding -- but
25 maybe I'm wrong. My understanding is we did, in our pretrial

1 statement in the section asking about whether we were seeking
2 bifurcation -- we did identify this. We have not yet -- we got
3 the other side's brief last night, late last night, and we have
4 not filed our reply, but we read it.

5 **THE COURT:** My question was there -- pretrial motions
6 are on a schedule. Failing to call something a motion in
7 limine when it's a motion to exclude evidence of punitive
8 damages is, in fact, a motion in limine. Calling it something
9 else doesn't change what its fundamental nature is. As they
10 say, a rose by any other name is still a rose.

11 **MR. SHAPIRO:** This is -- I believe, Your Honor --
12 first of all I have to correct myself. I guess we did not --

13 **THE COURT:** This was filed November 14th --

14 **MR. SHAPIRO:** But this is, for all purposes here, a
15 motion to bifurcate. The very introduction, the first sentence
16 of our brief says -- so it's not a motion in limine. I'm not
17 sure what evidence they are referring to. It says, "Google
18 respectfully asks the Court to bifurcate the trial in this case
19 into two phases."

20 **THE COURT:** Okay. Hold on. Let me get it.

21 Did you do a proposed form of order? Yes, did you. Let
22 me look at your order.

23 It is hereby -- you are asking me to bifurcate into two
24 phases, the first addressing liability and the second the
25 amount of damages.

1 **MR. SHAPIRO:** Yeah.

2 **THE COURT:** That's -- sounds like I dealt with that.
3 There's nothing else in the proposed order.

4 **MR. MCGEE:** And, Your Honor, I believe you did deal
5 with it in our response. We suggested the alternative. How
6 you did deal with it this morning was bifurcation with
7 financials to be done with the punitive stage, but what they're
8 seeking to exclude touches on what Mr. Sila and Mr. Frawley
9 argued. With the classwide damages and some other exhibits,
10 they're suggesting that should only come in when we're
11 discussing punitive damages.

12 So I think it goes a bit further than suggesting it's just
13 going to be how much is Google worth and how much can they pay.
14 It's also how much did they make, what are the classwide
15 damages. Those are the issues that they're trying to exclude
16 from the trial through this motion.

17 If we have that wrong, we did propose in the alternative,
18 I think, what you granted this morning, that it would just be
19 this morning routine bifurcation that California and federal
20 courts engage in.

21 **MR. SHAPIRO:** I don't think we have a real dispute
22 here, Your Honor. I think the -- some questions about specific
23 evidence, I think, are before you, and you're going to be
24 deciding that under the classwide evidence motion that --
25 that's pending and that you're going to be deciding.

1 This motion that I'm reading here, which is Docket 1064,
2 all we ask is that liability and damages and entitlement be
3 tried in one phase and the amount of punitive damages be tried
4 in another phase. I don't think that -- unless -- the
5 plaintiffs may be saying, *well, we need to right now decide*
6 *which types of evidence fall into phase one or phase two.* I
7 think that will be much clearer after Your Honor rules on the
8 motion about classwide evidence.

9 **MR. BOIES:** We agree, Your Honor. We agree with that.

10 **THE COURT:** I don't -- I'm not going to allow a reply
11 to be filed. I don't need a reply.

12 **MR. MCGEE:** Thank you, Your Honor, for the
13 clarification.

14 **THE COURT:** Okay.

15 I asked a question about testimony.

16 **MS. MCCracken:** Yes, Your Honor. We plan to provide
17 witness binders for each examination to the Court and
18 additional copies for The Court staff.

19 **THE COURT:** Let's talk about the way you need to deal
20 with exhibits. And I don't need them before the morning
21 because I'm not doing examinations.

22 So before each witness, you need to provide me with two
23 witness binders of your exhibits, one for me, one for my law
24 clerk. That is different than what you need to provide to
25 Mr. Cuenco.

1 Mr. Cuenco is the custodian of all exhibits that have been
2 admitted into evidence. What he needs from you is a -- just a
3 regular manila folder with the exhibit number and the exhibit
4 that has been admitted, and you give that to him, and he will
5 have a box, and he will collect in order anything that's been
6 admitted. Don't give him anything that's not been admitted.
7 All right?

8 **MR. MAO:** Understood, Your Honor.

9 **THE COURT:** Each needs to be individually put in a
10 folder so we can make sure at the end of the trial that we have
11 everything that's been admitted.

12 That box of exhibits individually identified will go into
13 the jury room. If there is something that is electronic, give
14 him the envelope with a sheet that says "electronic version
15 provided separately" or something to that effect so that the
16 jury knows, okay, if they're looking for that exhibit and they
17 look at the file folder, then they'll know *okay, we have to go*
18 *to the computer to find that particular exhibit.* Okay? Do
19 not -- do not bring in -- I don't need ten carts of documents.
20 Okay?

21 **MS. MCCracken:** Yes, Your Honor.

22 Would Your Honor prefer that we hand each individual
23 manila folder as the exhibits admitted in realtime or a
24 complete set of the folders at the close of --

25 **THE COURT:** You won't know if I haven't admitted them

1 yet, so you can give them to him at the end of the day, unless
2 they're stipulated. If you -- for instance, if you come in and
3 say *okay, for this witness, we've agreed on these ten*, then you
4 can hand him the ten, and ultimately I still need to decide
5 whether I admit them or not. Just because you stipulate does
6 not mean they come in. It probably will mean that they come
7 in, but it doesn't mean that they come in until I say that they
8 come in.

9 **MS. MCCracken:** Yes, Your Honor.

10 **MR. MAO:** Yes, Your Honor.

11 **THE COURT:** All right. Any questions on that?

12 **MR. MAO:** No, Your Honor.

13 **MS. MCCracken:** No, Your Honor.

14 **THE COURT:** All right. I want to talk about some
15 legal issues with respect to your instructions.

16 **MR. MAO:** Your Honor, just to explain a little bit,
17 Ms. Bonn and I divided up instructions, so we may both be up
18 here.

19 **THE COURT:** Okay. Our court reporter still needs to
20 know the plaintiffs' side. She just can't see the other side.

21 **THE COURT REPORTER:** I can see both sides now, Your
22 Honor.

23 **THE COURT:** Oh, okay. Great, Pam.

24 **MS. TREBICKA:** This is Viola Trebicka for defendants.
25 Your Honor, we have split up our jury instructions, so

1 depending on the issue, it will either be myself or my
2 colleagues, Ms. Crystal Nix-Hines or Ms. Teuta Fani.

3 **THE COURT:** Okay. Thank you. Okay.

4 Why is it that you all couldn't even agree on standard
5 non-substantive merit0based jury instructions? And I'm looking
6 at the plaintiff because the defense offered a whole slew of
7 basic generic instructions to which you did not stipulate.
8 Why?

9 **MS. BONN:** I believe on the -- on the standard Ninth
10 Circuit Pattern Instructions, we're fine with the content of
11 them. We -- all we're saying is that some of them may or may
12 not be necessary. If they're done in pretrial, you may not do
13 it in post or it may not become an issue during the trial.
14 That's all. But we have no issue with that set in terms of the
15 former content.

16 **THE COURT:** Where do you say that in your 500 pages?

17 **MS. BONN:** Yes, Your Honor.

18 **THE COURT:** I was doing a panel presentation, and --
19 actually for a class, and some of them, they were non-lawyers.
20 It was all about what Article III judges really do. Some of
21 them were lawyers, some of them weren't, so I kind of gave them
22 an overview of what we do.

23 And one of them, who was a lawyer, said, "Judge, what do
24 we do when the judge comes in and they're just cranky right off
25 the bat?" I said, "Well, maybe it's because of what you did

1 before the judge got on the bench that made them cranky, like
2 not agree to things that should be agreed to," and I'm supposed
3 to -- and I'm sitting here looking at you're disputing Jury
4 Instruction No. 2?

5 **MS. BONN:** I understand, Your Honor. So on page 39 of
6 Docket No. 1057, which is where that set of Ninth Circuit
7 Pattern Instructions come up, we say, "For the following
8 proposed instructions number through 16 to 0-34, plaintiffs do
9 not have any substantive objection; rather, plaintiffs believe
10 it may not be necessary to give these instructions at the end
11 of the trial, particularly if they've already been given at the
12 beginning." That's it.

13 So I apologize if that was done in a way that I was not
14 clear.

15 **THE COURT:** Let's see. When was it done? Here it was
16 done at the end of -- no.

17 How many pages do I have to go back? There are eight
18 pages of pontification regarding discovery misconduct, and
19 somehow at the eighth page, there's not even a page break about
20 statements regarding general instructions.

21 I look at the index, and I see dispute, dispute, dispute,
22 dispute, dispute. What does it mean when a judge sees a
23 dispute? It means we're supposed to resolve them for you.

24 **MS. BONN:** Understood, Your Honor.

25 **THE COURT:** It's a really bad look.

1 **MS. BONN:** Understood Your Honor.

2 **THE COURT:** I give these instructions at the beginning
3 and I give them at the end. That's the way I do it. The
4 objections are overruled.

5 With respect to -- it appears as if -- okay. Off the bat,
6 I am not your advocate, period. You should never give me
7 anything that would suggest to the jury that I care one way or
8 the other who wins this case. It is the jury's decision to
9 decide that.

10 So your statements frequently -- you know, that's why we
11 use models, because lawyers can't help themselves, and you
12 really should. You can't help yourselves to somehow suggest
13 things should be in instructions that are merely a recitation
14 of your theory of the indication.

15 If by the end of two weeks they don't know what data we
16 are talking about, you have failed on both sides. So why do I
17 need to explain that to them?

18 These are instructions for the end of the case, and you
19 think that they're not going to know what data we're talking
20 about? So what are we going to call it? I called it "at-issue
21 data" because that's the data that was at issue. The point is
22 to try to get this to the jury packaged in a way where they can
23 make the decision.

24 So what are you going to call it at trial? What are you
25 going to call it?

1 **MS. BONN:** Plaintiffs -- it's been used throughout the
2 case -- have called it "private browser" or "private browsing
3 data" because you're in a private browsing mode. So I just
4 think in practicality --

5 **THE COURT:** That's what you are going to use?

6 **MS. BONN:** That's what --

7 **THE COURT:** And what are you going to use?

8 **MS. TREBICKA:** Your Honor, the parties have called it
9 "at-issue data" throughout this case. Private --

10 **THE COURT:** Okay. So look at what you're going to do.
11 You're going to rewrite this knowing that the other side is not
12 going to use the same term as you. And I guarantee you that by
13 the end of the two weeks, they will know that you're not using
14 the same term. But I'm not going to use your terms. So figure
15 it out and rewrite it.

16 This is not a class action trial, and I am not inclined to
17 make it more complicated by suggesting that it is.

18 **MS. BONN:** Yes, Your Honor. I understand that.

19 One of the concerns that we have is that the reality of
20 our named plaintiffs' damage claims individually are like three
21 dollars a person, and I think that the jury is just going to be
22 confused and furious to be sitting here going *why are the*
23 *plaintiffs making us sit here in a jury box for a two-week*
24 *trial over a hundred dollars a plaintiff*, and I think that just
25 having -- we don't --

1 **THE COURT:** So how are you going to answer that
2 question?

3 **MS. BONN:** I think some context that they are also
4 issuing a finding that the Court will consider on behalf of the
5 class. That's it. We just want them to understand that what
6 they are finding matters not only for three dollars a plaintiff
7 or whatever it is, but the Court will take it into
8 consideration on behalf of the class as a whole. That is, I
9 think, important context for the jury not to be left with this
10 total misimpression that their time is just being wasted on a
11 fool's errand over a hundred dollars in federal court.

12 **THE COURT:** Response.

13 **MS. NIX-HINES:** Thank you, Your Honor.

14 Well, first of all, we would be happy to stip to a hundred
15 dollars total damages if opposing counsel would like.

16 In all seriousness, Your Honor, I think in all the
17 instructions that are before you, this is the one that is most
18 prejudicial to Google. There is absolutely no reason that
19 plaintiffs should be told anything about classwide damages.

20 They lost a damages class. There is no reason that the
21 jury -- and you can hear it even in the way counsel has
22 described it, that they want to indicate to the jury that there
23 are, in fact, millions of people behind these five plaintiffs
24 that -- that are the only things that they are deciding.

25 And it would be extremely prejudicial to Google. It would

1 convey that they've done something wrong, that there are a lot
2 of other people out there like the plaintiffs that have these
3 claims, and that is not, as Your Honor indicated this morning,
4 anything that the jury is going to be deciding.

5 And there is -- the probative value of that is minimal.
6 The prejudice is incalculable.

7 **MS. BONN:** May I respond briefly on that?

8 The notion that the jury won't hear that Google's
9 practices affect millions of people is wrong on the merits
10 because some of our claims have an element that depends on
11 whether the conduct at issue is highly offense to a reasonable
12 person, and Google itself has taken the position that it
13 relates to whether it violates social norms.

14 So the notion that somehow the jury is going to be walled
15 off from the fact that Google wasn't simply cherrypicking these
16 five people and targeting them with Incognito collection, but,
17 rather, they engaged in a practice that led them to profit and
18 that actually that's why repeatedly they refused to make
19 changes to Incognito because within the company, there are
20 numerous documents -- and I'm thinking of one in particular
21 where Ms. Porter Felt said, "We received a directive not to
22 make any change to the Incognito language or otherwise that
23 could affect our revenue."

24 So the idea that somehow we can create a hermetically
25 sealed system where the jury is just only going to hear

1 evidence about these five people and not that it's a broader
2 practice is impractical.

3 **MS. NIX-HINES:** Your Honor, if I may?

4 **THE COURT:** Hold on.

5 There are liability issues with respect to punitives.

6 **MS. BONN:** Yes.

7 **THE COURT:** And that's Phase 1.

8 **MS. BONN:** Yes.

9 **THE COURT:** So why isn't that enough? Why isn't that
10 enough? They're obviously going to know you're not here for a
11 hundred dollars.

12 Respond. Think about that.

13 A response.

14 **MS. NIX-HINES:** Your Honor, I agree with that totally.

15 And also, you know, if you look at the language of the
16 instruction, it has nothing to do with what she's talking
17 about. They are trying to propose "a class action is a lawsuit
18 that has been brought by one or more plaintiffs on behalf of a
19 larger group of people who have similar" --

20 **THE COURT:** Hold on. When lawyers read, they forget I
21 have a court reporter.

22 **MS. NIX-HINES:** Apologies, Your Honor.

23 **THE COURT:** Slow down.

24 **MS. NIX-HINES:** I'm reading from the very beginning of
25 their instruction, and it's laying out that this is -- "a class

1 action is a lawsuit that has been brought by one or more
2 plaintiffs on behalf of a larger group of people who have
3 similar legal claims. All of these people together are called
4 a class."

5 This is very different. To tell the jury that there is a
6 class action here when they lost their damages class is not
7 only misleading, but it's not doing what she's claiming they're
8 trying to accomplish, which is to talk about patterns.

9 They're trying to get it before the jury that there is a
10 class action. That's nothing the jury is going to decide, and
11 there's no basis to prejudice them with that at this point in
12 the trial.

13 **MS. BONN:** One last comment and then I think I've made
14 my point.

15 If the jury is not advisory to the Court on the
16 injunction, then maybe we wouldn't disagree, but this is an
17 advisory jury, and --

18 **THE COURT:** They can still be advisory to me
19 without --

20 **MS. BONN:** Understood. Understood.

21 But here's -- I think here's the issue and here's why I
22 think just -- they need to know that their ruling may have an
23 import broader than these five people. That's it. And they
24 need to know that it's something the Court is going to consider
25 more broadly.

1 **MS. NIX-HINES:** Your Honor, just in closing, what's
2 before the jury is deciding on the claims of these five
3 individuals. That's what they're being asked to do.

4 As you've already noted, it's a very complicated trial
5 with lots of claims, and they should be focused on what is the
6 business at hand and not have extraneous information that is
7 going to lead them to think that Google has did -- done a lot
8 of wrong for millions of people. That is intended to put a
9 finger on the scale, I would say probably even a hand, to tip
10 it in their favor in a way that's not going to get at the
11 truth. It's going to get them thinking about all sorts of
12 wrongdoing on a global scale when what is before them for
13 decision are the claims of these five plaintiffs.

14 **THE COURT:** Are there going to be charts or summaries?

15 **MS. BONN:** There are. We've submitted a handful of
16 106 -- 1006 summaries for our experts, I believe. There is
17 like a damages summary for Mr. Lasinski and then others. So,
18 yes.

19 **THE COURT:** And will there be -- okay. All right.

20 With respect to the misconduct, I probably won't give
21 that. We'll deal with that in different ways.

22 And here's another one of these examples where -- well,
23 argument went on for seven pages, which I don't classify it as
24 brief.

25 So 17, 0-17 will be given. 18 will be given. 19 will be

1 given.

2 So that you know, especially at the beginning of the
3 trial, I repeatedly remind jurors about publicity, about their
4 obligations, about due process. Their binders have -- the very
5 first sheet of their binder is a -- you know, it's a picture of
6 a cell phone that the courts have with all of the "do nots"
7 that they are supposed to do not do. And once, you know --
8 once I am sure that they have -- that message is fully embedded
9 in their conscious and subconscious, then I'll lighten up, but
10 before then I don't.

11 I tell them about the transcript. I tell them about
12 taking notes. All of that will happen.

13 At the end, the bench conferences won't happen. That's
14 22. That will be given at the beginning.

15 All right. Deposition in lieu of live testimony.
16 Typically what I do with 25 is I do it at the time that the
17 deposition is read. I do it a handful of times until I'm sure
18 that they understand.

19 Are we anticipating use of interrogatories?

20 **MS. BONN:** Potentially, yes. Potentially.

21 **THE COURT:** That, again, will be typically done at the
22 time so they understand what they're seeing.

23 By the way, you've given me a list of stipulations. It
24 doesn't look like any of them are stipulations as to facts;
25 correct?

1 **MS. BONN:** Correct.

2 **THE COURT:** Okay. Admissions -- are there going to be
3 admissions, requests for admissions? Are they being used?

4 **MS. BONN:** I think for plaintiffs it's very unlikely,
5 from what I recall.

6 **MS. NIX-HINES:** Potentially on our end, Your Honor.

7 **THE COURT:** Expert opinion, again, I typically do that
8 at the time. I'll repeat it at the end.

9 29 is not given in -- I usually don't give that as part of
10 the normal -- if they ask for readback, then I will, but I
11 don't encourage them to ask for readback.

12 Same with 30. There is no need.

13 Same with 31. It's not given unless necessary.

14 Same with 32.

15 And I give some version of 33, but I obviously won't give
16 it at the beginning.

17 Okay. With respect to 34, the Electronic Communications
18 Privacy Act, isn't it known as the Federal Wiretap Act?

19 **MS. BONN:** Colloquially sometimes known as the ECPA.
20 I think in this case we just intend to refer to it correctly as
21 the ECPA. I think that the word "wiretap," which it's not even
22 really the name of the current statute, brings up all sorts of
23 thoughts amongst jurors. *Oh, it's Nixon. You have to have*
24 *some device tacked to a phone line,* and I don't see the need to
25 use an incorrect statement.

1 **MS. NIX-HINES:** Your Honor, it is known as the ECPA or
2 the Wiretap Act. In fact, the ECPA is the over-arching title
3 for three separate acts: Title I is the Wiretap Act, Title II
4 is the Communications Act, and Title III is the Pen Register
5 Act. So actually the "Wiretap Act" is more the specific term.
6 Judge Sands uses it in his instruction. DOJ uses the Wiretap
7 Act in their guidance, and case law, as recently as 2023,
8 including the Ninth Circuit, uses the Wiretap Act, so we see
9 this as a non-issue and both terms can be used.

10 **THE COURT:** I'll use both.

11 Okay. With respect to the California Computer Data Access
12 and Fraud Act, Claim 1 -- let me ask this question. Which of
13 the claims allow for injunctive relief?

14 **MS. BONN:** I believe, Your Honor, that all of our
15 claims do, and with the slight caveat with respect to the
16 breach of contract claim, it may be referred to as specific
17 performance or other equitable relief rather than,
18 quote/unquote, an injunction, but the effect is essentially the
19 same.

20 **MS. TREBICKA:** Your Honor, the breach of contract
21 claim does not allow for injunctive relief.

22 **THE COURT:** But all of the others do?

23 **MS. TREBICKA:** I believe all of the others do.

24 **THE COURT:** Okay. So there are going to be -- they're
25 going to be deciding then the factual elements underlying all

1 of the claims that provide for injunctive relief.

2 **MS. BONN:** I think with this caveat, which is neither
3 side have submitted any jury instructions related to our unfair
4 competition law claim --

5 **THE COURT:** The unfair competition claim 17200 is not
6 a jury claim.

7 **MS. BONN:** Correct.

8 **THE COURT:** All right.

9 Do you wish to be heard on -- well, let me say this.
10 Given that all of the claims, other than breach of contract,
11 relate to or include injunctive relief, I will advise the jury
12 that their factual findings on liability can inform the Court
13 with respect to court-ordered remedies.

14 **MS. BONN:** Thank you.

15 **THE COURT:** I will do that, and so you can -- you
16 should meet and confer on a possible instruction, and we'll add
17 that to the -- I think it's December-- the December deadline.

18 **MS. TREBICKA:** 22nd.

19 **THE COURT:** Is that the date I gave?

20 **MS. TREBICKA:** Yes, Your Honor.

21 **THE COURT:** I thought it was earlier than that. We
22 can't hear you, but I'm checking my notes. December 15.

23 **MS. TREBICKA:** I apologize, Your Honor. I believe
24 22nd was for something else.

25 **THE COURT:** Yes.

1 Okay. So not a class action, but the fact that their
2 findings with respect to the elements of all of these claims
3 will help inform the Court's role in providing a remedy.

4 **MS. BONN:** Thank you, Your Honor.

5 **THE COURT:** All right. I have your -- your arguments
6 with respect to -- well, with respect to damage loss versus
7 harm. Do you want to say anything more or not?

8 **MS. BONN:** I would make one comment because I was
9 looking at what further areas we might be able to compromise
10 on, and I think there's two issues.

11 There's one of do you use the word "harm" or do you use
12 "damage or loss." And then there's the second issue which is
13 Google says "damage or loss" is like confined to this small
14 cabin that excludes disgorgement and the other remedies that
15 were already addressed at summary judgment.

16 To the extent that there's not a limitation placed on us
17 of not being able to say that unjust enrichment, etc.,
18 constitute loss, we would be fine using the terminology "damage
19 or loss" instead of "harm." I'm not sure it's -- it's -- it
20 may be a distinction without much of a difference. But to the
21 extent what Google is trying to do is to say well, damage or
22 loss is this much more cabined issue than harm, that's where I
23 think the dispute comes down to.

24 **THE COURT:** Well, that can be addressed in terms of
25 the damages instruction.

1 **MS. BONN:** Correct.

2 **THE COURT:** Is it wrong -- you have a -- well, okay.
3 Anything else on this one?

4 **MS. TREBICKA:** Your Honor, which way is Your Honor
5 leaning so I know whether to address or not --

6 **THE COURT:** So I'm not -- I'm not going to tell you.
7 I can tell you in general I'm leaning towards whatever the CACI
8 says. So if you have changed CACI, you're on the losing side.
9 I don't know because I've got 10 pages on one instruction when,
10 in fact, I was kind of thinking that what I do is strike the
11 entire document, make you go back, and do what I said to do,
12 which was give me a brief argument because your brief arguments
13 are all so much better than your long pontification arguments.
14 So --

15 **MS. TREBICKA:** We feel good on the cases, Your Honor,
16 because that's the models that we have used.

17 On damage or loss, there is a lot of precedent, including
18 Supreme Court precedent, that cabins damage or loss to
19 technological harms, so now sweeping in remedies like unjust
20 enrichment will be clear error, and the seminal case here is
21 the Van Buren Supreme Court decision --

22 **THE COURT:** We're not at damages.

23 **MS. TREBICKA:** Understand, Your Honor.

24 **THE COURT:** You're late on your damages argument.

25 **MS. BONN:** CACI uses the word "harm," I believe, not

1 "damage" or "loss" on this instruction.

2 **THE COURT:** CACI 1821. Yep, CACI uses "harm."

3 **MS. TREBICKA:** No dispute there, Your Honor. But I
4 heard opposing counsel say that plaintiffs will take "damage"
5 or "loss" which is the phrasing that's closer to the statute.

6 **MS. BONN:** Well, it all comes down to damages. I
7 mean, if we work out the damages instruction to our
8 satisfaction, I'm not going to sit here and fight over "harm"
9 versus "damage" or "loss" but CACI says "harm."

10 **THE COURT:** On 1.2, the addition -- defendants'
11 additional statement, which exceeds CACI, there's -- I doubt
12 I'll give that. That's argument, and it's not necessary.

13 **MS. TREBICKA:** Understood, Your Honor. And
14 plaintiffs' addition or data is likewise not in the CACI.

15 **MS. BONN:** I will say it's straight out of the
16 statute, and on that issue, CACI, you know -- the statute talks
17 about computer, computer network, computer system, computer
18 program or data, and the CACI abbreviates it.

19 **THE COURT:** Slow down.

20 **MS. BONN:** Yeah.

21 CACI talks about -- excuse me. Penal Code 502 talks about
22 computer, computer network, computer system, computer program,
23 perhaps a few other computer modifiers and then "or data," and
24 CACI abbreviates and only uses a couple of the words from the
25 statute. Clearly here -- I mean, our claim is about private

1 browsing data, so I think that that's why we proposed that
2 addition.

3 **THE COURT:** Is it legally wrong?

4 **MS. TREBICKA:** Yes, Your Honor, it's legally wrong.

5 Let me clarify that actually. Let's look at the essential
6 factual elements which is CACI 1812, and in the first element,
7 which is "proof that plaintiffs owned the computer, computer
8 system, network, and/or data," that's where "data" appears
9 because plaintiffs do need to prove that to the extent data was
10 at issue, they are the owners of that data.

11 However, when it comes to access, which is the instruction
12 that Your Honor was focused on, Disputed Instruction 1.2,
13 access to data will not do, according to the statute as well as
14 according to the CACI, which is why plaintiffs had to add the
15 word "or data."

16 And, Your Honor, you not look only to the CACI. The
17 statute itself defines the term "access" as "access to computer
18 systems and networks," not to data.

19 **THE COURT:** Is there any doubt that anybody is using
20 Incognito Mode without a computer or a mobile device? I mean,
21 is anybody arguing that they're using Incognito Mode without
22 accessing a computer or mobile device?

23 **MS. TREBICKA:** That's not the issue for the
24 instruction. Plaintiffs need to show that Google accessed that
25 computer system or device. So no one is doubting --

1 **THE COURT:** I'm sitting here, and I pull up Incognito
2 Mode on my computer, and the jury finds that you have accessed
3 my data inappropriately, how did you get there but for going to
4 the computer or device?

5 **MS. TREBICKA:** That's a long -- wrong legal issue
6 though, Your Honor. The legal issue is according to the
7 statutes, which is a hacking statute, did defendant access a
8 computer, computer system, computer network, or device. That
9 is the issue that the jury must decide.

10 Data comes in in the -- in the context of harm, proving
11 harm, etc., but --

12 **THE COURT:** All right. I understand.

13 **MS. TREBICKA:** Thank you.

14 **THE COURT:** Okay. Yes.

15 Yay. You agree on substantial factor. Yay, fun. Three
16 lines.

17 Okay. Second claim. CIPA.

18 **MR. MAO:** Your Honor, one of the --

19 **THE COURT:** Mr. Mao, just for purposes of the record.
20 Go ahead.

21 **MR. MAO:** Mark Mao, Boies Schiller, for the
22 plaintiffs.

23 Your Honor, one of the reasons for the disagreements on
24 631 is because there is no standard instruction for 631. There
25 is one for 632.

1 So we believe that the plaintiffs have done their best to
2 try to keep it within the statute and the actual language of
3 the statute.

4 There is other some disagreements, but I'm happy to
5 address that, Your Honor.

6 **THE COURT:** So who's version is closest to CACI 632?

7 **MR. MAO:** If you're asking me, Your Honor, of course I
8 would say that we are, but there's some disagreement.

9 **MS. NIX-HINES:** Actually, Your Honor, we believe that
10 with respect to 631, it's more appropriate to follow the plain
11 language of the statute, and that's what our instruction does.

12 **MR. MAO:** I think we would agree on that, Your Honor.

13 **THE COURT:** You would agree on what?

14 **MR. MAO:** Following the language of the statute.

15 **MS. NIX-HINES:** And, in fact, Your Honor, there are
16 several instances in which plaintiffs are reading out elements
17 that are in the plain language of the statute, and we think
18 that's very problematic, and I'm happy to walk through that, if
19 you'd like.

20 **MR. MAO:** If --

21 **THE COURT:** So why is it that -- is there -- you
22 disagree on whether there's a 632 claim?

23 **MS. NIX-HINES:** No, Your Honor. We're going to
24 address 632 separately. Right now we were talking about 631-A.

25 **THE COURT:** The reason I'm asking is they have in here

1 631 and 632.

2 **MS. NIX-HINES:** Oh, yes. We disagree that that should
3 be incorporated into 631. We think that's going to be
4 confusing for the jury, and it's not necessary because there is
5 a separate 632 instruction.

6 **MR. MAO:** If we can clarify the differences in 631 and
7 632, I would be okay with that modification, Your Honor, to
8 make sure that's clear.

9 **THE COURT:** Typically what I would do is the verdict
10 form is going to have -- the jury instructions need to track
11 the verdict form, and so I would separate them out. That is my
12 practice. They can look at an instruction, and they will all
13 have copies of the instructions. They look at an instruction,
14 they'll look at the form, and figure that out. So in general,
15 I separate them out.

16 **MR. MAO:** May I perhaps attempt to summarize what I
17 think are the four main issues of dispute for this instruction?

18 **THE COURT:** Go ahead.

19 **MR. MAO:** I believe, Your Honor, it is first on the
20 issue of what constitute contents, and that is primarily on the
21 issue of whether URL can qualify as contents, although Google
22 does not address the fact that search terms are in the URLs and
23 whether or not that's content. I believe that's already been
24 agreed to by counsel in prior hearings, that search terms
25 included in URLs would be contents. I think our --

1 **MS. NIX-HINES:** Sorry, Mr. Mao --

2 **THE COURT:** Do not interrupt him.

3 **MS. NIX-HINES:** Apologies.

4 **THE COURT:** Finish.

5 **MR. MAO:** I believe, Your Honor, the primary
6 disagreement is on contents as to a URL only without search
7 terms not in instances in this case where the URL contains
8 search terms.

9 **THE COURT:** Hold on.

10 Okay. I'm going to need you to say that again. I lost my
11 realtime. One more time.

12 **MR. MAO:** I'm trying to avoid argument because I'm
13 just trying to summarize.

14 On contents, I believe the fight is over URL alone without
15 search terms. In prior hearings, if we review the transcripts,
16 I don't think there is any dispute on the search terms within
17 the URLs themselves.

18 Next, number two, is what is "in transit"? I believe the
19 dispute, if I may try to characterize it, is that Google's
20 argument is that if it's intercepted from the device as opposed
21 to between the two devices during the communications, that
22 would not be an interception. In other words, if I tap the
23 phone when the phone is receiving on the receiver end, that
24 would not be in transit. That is Google's argument and the
25 basis for that dispute.

1 I believe that there is a dispute on intentionality and
2 whether or not there's a factual dispute in this case on
3 intentionality.

4 And then lastly I believe that there is a dispute on
5 whether or not CIPA applies in this case to everybody, although
6 we point out in the pretrial statement, Google already conceded
7 that California law applies.

8 But those are -- those are my understanding as to the four
9 disputes.

10 And happy to address that in any order, Your Honor.

11 **THE COURT:** All right. With respect to this, is
12 content -- well, let me ask first, yes or no, are those the
13 four issues?

14 **MS. NIX-HINES:** Well, Your Honor, we would prefer to
15 talk about what elements are actually required in CIPA. We are
16 not making substantive arguments about whether certain elements
17 have been satisfied. Those are going to be arguments that we
18 would --

19 **THE COURT:** That's not my question. Are the four
20 issues that he -- that he has identified, are those the four
21 issues of dispute with respect to the elements of the claim?

22 **MS. NIX-HINES:** Your Honor, we believe that there are
23 some additional elements, if I may --

24 **THE COURT:** So at least those four?

25 **MS. NIX-HINES:** Well, I don't agree with his

1 interpretation of what the in transit dispute is about, but,
2 yes, generally there is a dispute over in transit.

3 **THE COURT:** So do you agree there is a dispute about
4 content?

5 **MS. NIX-HINES:** Yes.

6 **THE COURT:** In transit?

7 **MS. NIX-HINES:** Yes.

8 **THE COURT:** Intentionality?

9 **MS. NIX-HINES:** Yes.

10 **THE COURT:** Whether it applies to all plaintiffs?

11 **MS. NIX-HINES:** I'm not sure what Mr. Mao means by
12 that one.

13 **THE COURT:** I see your colleague nodding yes.

14 **MS. NIX-HINES:** Oh, the in California, yes.

15 **THE COURT:** And then what else is a dispute, in your
16 view?

17 **MS. NIX-HINES:** So we had already discussed the use of
18 private browsing communications, and I won't belabor that, but
19 we do believe that that is a prejudicial term to include in the
20 elements because it presupposes a fact that we believe
21 plaintiffs must prove, which is that the communication --

22 **THE COURT:** I understand. What else?

23 **MS. NIX-HINES:** We also disagree with the structure of
24 the way the statute is -- the instruction is framed. There are
25 two separate burdens, in our view, and according to the

1 statute, to prove that the communication was intercepted in
2 transit and that it occurred in the State of California,
3 plaintiffs eliminate -- seek to eliminate the in-transit
4 requirement and merge it with the in-California requirement,
5 and we believe that that's improper, so that is another area of
6 dispute.

7 And then finally --

8 **THE COURT:** What is the evidence on the California
9 portion?

10 **MR. MAO:** It's actually rather straightforward,
11 Your Honor.

12 Setting aside the company and the processes and the team
13 reading and using the contents that are in California, Google
14 in this case has consistently argued that their terms apply in
15 this case for everybody with or without the class. And within
16 that provision is the selection of California law, and CIPA is
17 that California law, so I'm a little confused as to how Google
18 would, on the one hand, say that there is either -- you know,
19 these various contractual arguments and, on the other hand,
20 selectively take out the fact that they've agreed and conceded
21 that California law, such as CIPA, applies.

22 **THE COURT:** Okay. Court reporter needs another break
23 so we will stand in recess for 15 minutes.

24 (Recess taken at 1:34 p.m.)

25 (Proceedings resumed at 1:48 p.m.)

1 **THE COURT:** All right. We're finishing up with
2 respect to CIPA, Claim 2. In terms of your -- well, in terms
3 of your arguments on defining certain terms, anything you want
4 to say beyond what's already here?

5 **MS. NIX-HINES:** Yes, Your Honor.

6 We think terms matter, and as much as possible, we've
7 tried to adhere to plain language of the statute, as well as
8 terms that have been used throughout the litigation and that we
9 think will be clear to the jury. As you indicated, they are
10 ordinary humans. We want to make sure things are very clear
11 and straightforward, so we've used in the -- if you look at the
12 introductory instruction and it carries over, while in private
13 browsing mode, which is something that actually the plaintiffs
14 reference and they cite our 2018 privacy policy in their mini
15 brief in which we use that very term, "in private mode," like
16 Chrome Incognito Mode, and they, you know, embrace that. So we
17 don't think that there should be any issue with using a very
18 clear term and a neutral term, as Your Honor has indicated,
19 like "in private browsing mode" as opposed to a loaded term
20 like "private browsing communications" which presupposes that a
21 communication was private.

22 But as you know, a core defense for Google is that we
23 don't guarantee privacy in all circumstances, and this is
24 something that the plaintiffs --

25 **THE COURT:** You don't need to say more other than

1 that. My inclination on that element, at least, is to use
2 Google's suggestion.

3 **MS. NIX-HINES:** Thank you.

4 **MR. MAO:** Your Honor --

5 **THE COURT:** There are --

6 **MR. MAO:** Your Honor --

7 **THE COURT:** Your suggestion has an inference. I never
8 give instructions with inferences. And there's nothing
9 inconsistent with your theory, given their suggestion.

10 **MR. MAO:** Yes, Your Honor. I was actually trying to
11 make sure that before you moved on -- your question was, is
12 there anything else to address. I was actually trying to
13 address that.

14 Generally, Your Honor, I think we're okay with sticking
15 with the statutory language of 631. I think where we actually
16 are in debate is the case law over how some of those
17 definitions end up getting fleshed out.

18 Again, just reminding Your Honor, there is no model
19 instruction for 631, and I do think that that contributes to
20 the aggregation on both sides.

21 May I at least address the two things I just wanted to
22 flag real fast, Your Honor?

23 **THE COURT:** On what?

24 **MR. MAO:** On the 631 instruction, which is what we
25 went on break on.

1 **THE COURT:** Well, I just -- there are a couple of
2 other things, so you each want -- well, there's -- there are
3 proposed definitions for "transit," for "consent," and then for
4 "willfulness."

5 **MS. NIX-HINES:** Your Honor --

6 **THE COURT:** Again, my -- what I will always do first
7 is go to the form instructions. Then I'll go to the statute.
8 Then I'll go to Ninth Circuit authority. That tends to be my
9 approach.

10 **MS. NIX-HINES:** Thank you, Your Honor. We're very
11 pleased with that approach.

12 And if I may, with respect to Element 2, we are the only
13 party that actually uses the express language of the statute,
14 which is requiring that Google receive the communications,
15 quote, while in transit.

16 Plaintiffs are seeking to read that requirement out of the
17 statute, and there's simply no justification for it. It's part
18 of an express requirement that's in the statute.

19 **THE COURT:** Okay. We need to move on from 631. I've
20 got -- I have the arguments.

21 Did you want to say anything about the other -- the other
22 pieces that I mentioned: Transit, consent, willfully?

23 **MR. MAO:** Yes, Your Honor.

24 So first of all, "in transit," I disagree with the
25 characterization "in transit" because we did use the language

1 from the statute on Element No. 2, which is what counsel is
2 referring to.

3 There has been a decision subsequent to this submission
4 which further elucidated, and I realize it's a different judge
5 in this district court, but Judge Chen agreed with our
6 definition and our interpretation of "in transit" which is that
7 you can be tapped on your device and that would still be in
8 transit as part of the communications.

9 We sent the authority which is the case of *James vs. Walt*
10 *Disney company*. This was decided on the 8th of this month, so
11 after the submission, and we sent that -- a copy of that
12 authority to opposing counsel, and if Your Honor wants a hard
13 copy for your convenience, we have that --

14 **THE COURT:** Case number.

15 **MR. MAO:** Sure. That is 2023 U.S. District Lexus --

16 **THE COURT:** Do you have a case -- the number of the
17 case?

18 **MR. MAO:** I have a West -- yes, I do. I have -- it's
19 23-CV-02500. And --

20 **THE COURT:** Okay. And it was on -- what kind of
21 motion was it?

22 **MR. MAO:** This was a motion to dismiss. And Walt
23 Disney's argument was similarly that if the device is
24 essentially tapped at the -- at the end, for the purposes of
25 listening to the conversations and the communications, then

1 that would not be in transit. And the judge there rejected
2 that.

3 **THE COURT:** I'll take a look at his opinion.

4 **MR. MAO:** With regard to in California, this is what
5 happened when we had went on break, Your Honor. Again, point
6 out, Google argues California law applies.

7 **THE COURT:** You already said that.

8 **MR. MAO:** Yes.

9 And then lastly, with regard to the fifth element --
10 sorry. With regard to the element of willfulness, the
11 interpretation and definitions which is used by Google is just
12 nowhere within the statute. They have a very high threshold
13 for what willfulness is, essentially incorporating criminal
14 statutes for the purposes of the statute, and that's just not
15 what's within the case law and that's just not there.

16 And I don't think that factually Google has any dispute
17 really that they've been undergoing this conduct intentionally,
18 especially given the documents that have shown up in this case.

19 **MS. NIX-HINES:** May I respond, Your Honor?

20 **THE COURT:** You may.

21 **MS. NIX-HINES:** Thank you, Your Honor.

22 First, with respect to the first argument, again, we go
23 back to the plain language of the statute which requires that
24 the communication must have occurred in the State of
25 California, and the fact that California law applies to terms

1 of service in other issues does not mean and it does not
2 relieve the plaintiffs of having to establish an express
3 element of 631. It's simply not the case.

4 With respect to willfully -- and you will see it again in
5 intentionally throughout their instructions -- plaintiffs
6 actually assert that we have conceded these elements, and
7 therefore they ask you to state that there's no dispute that
8 these elements have been satisfied, and we fundamentally
9 disagree, Your Honor. We have consistently denied that we've
10 engaged in willful violations of the law. And it is not for
11 them to take away a defense that we're entitled to or an
12 obligation of the plaintiffs that -- of an element that they
13 must affirmatively prove.

14 **THE COURT:** So this a penal code statute. So there
15 are definitions for "willfully." Are you suggesting that the
16 plaintiffs are using a -- a civil version of -- of a "willful"
17 definition versus criminal? I don't --

18 **MR. MAO:** No, Your Honor. I think --

19 **THE COURT:** Who's referencing Penal Code Section 7 in
20 the authorities? That's from plaintiffs so --

21 **MR. MAO:** I -- I think it is -- I think the point,
22 Your Honor -- if you want me to step back for a moment on
23 this -- it's easier to stick to the statute which is that the
24 word says "willfully."

25 **THE COURT:** I'm going to define what "willfully"

1 means.

2 MR. MAO: Yes.

3 THE COURT: If there's a definition in the statute or
4 in CACI or some other book, that's the definition I'm going to
5 use. They need to know what "willfully" means.

6 MR. MAO: And if you look at the authorities we've
7 cited to, we've stuck to what we believe is the proper
8 referencing section.

9 MS. NIX-HINES: Your Honor, I'm not sure --

10 THE COURT: Okay.

11 MR. MAO: Sorry. And that's on page 95, just so
12 that --

13 THE COURT: I have it. "Willful" --

14 MR. MAO: That was for opposing counsel because we
15 were looking at different pages, she and I.

16 THE COURT: I see.

17 MR. MAO: Sorry about that.

18 THE COURT: We're on Docket 1057 page 95 or page 96 of
19 293.

20 So plaintiff suggests that "'Willfully' means
21 intentionally; that is, that the defendant intended to do the
22 act. It does not require any intent to violate the law or to
23 injure another or to acquire any advantage." That's pretty
24 basic in terms of what the term means under California law.
25 We've got a California cite.

1 Google suggests that "To act 'willfully' means to act with
2 a purpose or willingness to commit the act."

3 I'm not sure that that's accurate. It's not an accident,
4 and there -- I mean, unless you're referring to some
5 specific-intent criminal statute, where -- where does that come
6 from?

7 **MS. NIX-HINES:** Well, Your Honor --

8 **THE COURT:** This isn't a criminal case. It's a civil
9 case.

10 **MS. NIX-HINES:** Well, first, I just wanted to make the
11 point, but it sounds like Your Honor agrees that willfulness
12 should be included as part of the instruction. Plaintiffs'
13 initial position was that willfulness doesn't even need to be
14 given --

15 **THE COURT:** I'm going to define it.

16 What is wrong with the California statute -- the
17 California *People vs. Hagedorn* definition?

18 **MS. NIX-HINES:** Well, we believe, Your Honor, that
19 it's not simply, you know, an intent to do the act, but it's --
20 you have to look at willful next in the context of the words in
21 the statute so --

22 **THE COURT:** I'm not sure that I agree with you. What
23 authority do you have? And, in fact, as an initial matter,
24 these words are commonly used, and that's why they have common
25 definitions. And *People vs. Hagedorn* seems to be -- it

1 certainly defines it in a way that I understand it. And I
2 don't know where your definition comes from.

3 **MS. NIX-HINES:** Thank you, Your Honor.

4 We're prepared to accept that definition. Our biggest
5 concern was that it be included as an affirmative element as it
6 is in the statute.

7 **THE COURT:** In terms of the number of violations, I'm
8 not going to tell them what the statutory amount is, not in the
9 instructions. It doesn't really matter.

10 I will remind them that plaintiffs have to prove their --
11 each and every element by a preponderance of the evidence, and
12 that includes the number of violations, and if they are proving
13 it by a preponderance of the evidence, then they're not
14 speculating, guessing, or engaging in conjecture.

15 We're moving to 632. I don't want to hear argument
16 anymore about the private browsing modes.

17 With respect to the way it's structured, I will likely use
18 Google's approach as opposed to plaintiffs' for the same
19 reasons I'm doing it with respect to Claim No. 3.

20 "These" versus "this"? What is it that you don't agree on
21 between "these" versus "this" in Elements 2 and 3?

22 **MR. MAO:** So this -- I think this relates a little bit
23 to the issue of contents in 631. If you looked at 631, the
24 disagreement over contents had to do with the examples, in my
25 opinion, at least -- had more to do with the examples that

1 would help a juror reading the instructions understand what --
2 what are examples of contents.

3 **THE COURT:** Well, that's what argument is for.

4 **MR. MAO:** Right. Right. And I think that "these"
5 versus "this" has to do with whether each and every one of
6 those examples, insofar as they may sit in data, may or may not
7 be confidential.

8 **THE COURT:** "These" versus "this".

9 **MS. NIX-HINES:** Your Honor, so there are a number of
10 issues here. One, plaintiffs proposed to instruct the jury
11 that it need not consider whether plaintiffs were harmed, and
12 we think this is misleading standing alone.

13 **THE COURT:** I asked you about "these" versus "this",
14 page 100, Claim 3, Elements 2 and 3.

15 **MS. NIX-HINES:** Regarding the objectively reasonable
16 expectation and that Google did not have the consent of all the
17 parties --

18 **THE COURT:** She's not going to be able to hear you
19 when you're talking not in the mic.

20 **MS. NIX-HINES:** Sorry. It's hard being tall. I have
21 to bend down.

22 **THE COURT:** Claim 3 has a reference to Element 2 and
23 element 3. You cannot agree on the words "these" vs. "this."

24 **MS. NIX-HINES:** Right. Thank you, Your Honor.

25 So plaintiffs have made what we consider to be, you know,

1 a strawman argument regarding communications. They believe it
2 should be in the plural rather than the singular. And we, you
3 know -- if you look at the case law, you look at the language
4 in the statute, it all uses the singular, even Judge Koh, who
5 they tout also uses the singular.

6 We don't think it creates the perception that there could
7 only be one communication at issue in the trial. Obviously
8 plaintiffs will have the opportunity to show that there were
9 multiple interactions with non-Google websites. But, again, we
10 like to adhere to the plain language.

11 **THE COURT:** So --

12 **MR. MAO:** Your Honor --

13 **THE COURT:** CIPA 632 uses "intentionally" and CIPA 631
14 uses "willful."

15 **MS. NIX-HINES:** Yes, Your Honor.

16 **MR. MAO:** It depend on which of the four different
17 types of violations we're talking about under 631. It's a very
18 long paragraph. And I believe, from my recollection, I think
19 both words are used, but --

20 **THE COURT:** The reason that I'm asking obviously is
21 because in 631, you're asking me to define "willfully" and 632
22 you're asking me to define "intentionally." I will define it.
23 Again, it is not clear to me that Google's proposal is
24 accurate, and I will --

25 **MS. NIX-HINES:** Your Honor, respectfully, I point you

1 to Judge Sands' Instruction No. 92.7.

2 **THE COURT:** I don't know who Judge Sands is, and is
3 that -- who is Judge Sands and are they on the Court of Appeal
4 for California?

5 **MS. NIX-HINES:** No, Your Honor. This is a New York
6 judge, but our understanding was that a number of courts rely
7 on his model instructions for these statutory --

8 **THE COURT:** A New York judge. I'm supposed to take
9 his word over a three-judge panel of the Court of Appeal of
10 California? No, I don't think so. Unlikely.

11 Okay. Next.

12 **THE COURT:** So --

13 **MR. MAO:** I believe Your Honor had an interpretation
14 of this element in your summary judgment order following --
15 although the order says 630, subsection C, I believe Your Honor
16 meant 632, subsection C in the order, but my point there is we
17 believe that you have the correct interpretation there in that
18 order, Your Honor.

19 **MS. NIX-HINES:** Sorry, counselor. Which elements are
20 you discussing?

21 **THE COURT:** I can't hear you.

22 **MR. MAO:** Oh, sorry. Over "objectively reasonable
23 expectation of confidentiality," as you have termed it, which
24 is jury instruction 33.

25 **MS. NIX-HINES:** Your Honor, with respect to that

1 instruction, the parties agree that plaintiffs must prove
2 objectively reasonable expectation of privacy -- well --

3 **THE COURT:** I will likely -- I think "overheard" or
4 "recorded" might need definition. "Objectively reasonable
5 expectation" I doubt does. Juries ultimately decide what is
6 objectively reasonable by the -- by their decision. They are
7 the ultimate arbiters of what that means.

8 It will be important for you to remember, when you're
9 presenting evidence, what evidence you're actually presenting
10 so that they can understand what evidence supports an
11 objectively reasonable interpretation.

12 I don't know that I would define it in the first instance
13 unless there was some confusion, but I'll think about it.

14 **MS. NIX-HINES:** Yes, Your Honor. And as you're
15 deliberating, I would just call out the importance of the jury
16 understanding that it's an objective standard and not a
17 subjective standard, which I think could be confusing to the
18 jury unless it's succinctly --

19 **THE COURT:** And it may be that I should define
20 "objective" if it comes up multiple times. That's reasonable.

21 **MR. MAO:** Your Honor, we definitely always agreed it
22 was an objective standard.

23 **THE COURT:** I don't think anyone disagrees with the
24 standard. The question is whether it gets defined. But
25 defining "objective" or "objectively reasonable" and the entire

1 phrase are two different things.

2 Moving on to the fourth claim.

3 **MS. NIX-HINES:** Your Honor, before we move on -- I
4 know we're long on time -- I just want to say briefly that with
5 respect to consent, Google uses the CACI 1809, and it's
6 important that each plaintiff has to prove either that the
7 plaintiff or the website she visited did not consent to
8 Google's receipt of the plaintiff communications with
9 non-Google websites, so our instruction is oriented towards
10 making that clear, which we believe is firmly grounded in the
11 precedent.

12 **MR. MAO:** Your Honor, we do have a fundamental
13 disagreement there, which is if you look at both that section
14 and the preamble to that section, California Wiretap Act
15 provides that all parties to the communications must consent.

16 And the disjunctive that is being used by counsel is not
17 only contrary to the instructions and the case law but also the
18 express language of the statute and the legislative intent. I
19 think that one is really clear.

20 And, Your Honor, I do believe that -- that the statutory
21 construction on that was also laid out in your motion for
22 summary judgment order, Your Honor.

23 **MS. NIX-HINES:** Your Honor, when you look at what
24 plaintiffs are proposing, that plaintiffs must offer some
25 evidence that they or non-Google websites did not consent,

1 there is nothing in the statute that has a -- that partial
2 consent, some evidence. It's simply not there in the plain
3 language, and this is -- will significantly relieve the
4 plaintiffs of having to prove that they did not consent. And
5 nowhere have they cited any case that has that kind of partial
6 language.

7 **THE COURT:** Moving to the fourth claim.

8 **MS. NIX-HINES:** I'm happy to start, if you'd like.

9 **THE COURT:** You're the one that is asking for
10 additional ones. Do not repeat -- a lot of this -- again,
11 there is repeat, so I don't need to hear repeated arguments.

12 **MS. NIX-HINES:** Understood, Your Honor.

13 **MR. MAO:** If I may, just on 44, "contents," real fast,
14 Your Honor, because this incorporates the prior sections, I
15 just want to make clear that contents, there is -- I think part
16 of the disagreement is that Google should be putting -- if
17 they're going to give very specific examples and a long list of
18 examples, it should include at minimum the type of data
19 actually at issue in this case, which does include search --
20 search terms search queries -- that's actually in the technical
21 reports and analysis, and you can't selectively pick ones in
22 which they would argue how close they are to non-content and
23 selectively leave out the ones which are, indeed, content, and
24 they've conceded in the prior hearings that those things are,
25 indeed, content.

1 So I think for contents here, insofar as we're going to
2 rely on, you know, prior examples, I think that one is also
3 very clear with the ECPA across multiple circuits.

4 **MS. NIX-HINES:** Google's instruction lays out very
5 clearly what has been considered contents and what is not.

6 With -- regarding URLs, we believe that plaintiffs are
7 sort of skipping over *Zynga* lightly. You know, *Zynga* gave the
8 example -- and we don't disagree that a URL under certain
9 circumstances, as Your Honor has pointed out, could be
10 contents, but it has to be in the very specific situation of
11 containing search terms that were inputted by the user; not a
12 third party, but by the user.

13 And *Zynga* gave the example of collecting a URL revealing
14 that the user had to been to a gay support groups page on
15 Facebook, and even though that involved sensitive information,
16 the case held that that did not constitute contents, even
17 though it revealed a particular page and the nature of the
18 user's browsing.

19 And Facebook, which they rely on, concerned URLs that
20 could emanate from search terms inputted into a third party's
21 search engine. So it would be misleading to just say that URLs
22 could be contents. It has to be in a specific situation of
23 where there are search terms inputted by the user.

24 **MR. MAO:** Just real quickly on that, Your Honor, I'm
25 glad that counsel agrees that search terms within URLs will be

1 content. I think that's going to be easy to establish in this
2 case. It's already well-briefed in the reports.

3 But setting that aside, contents for non-search for URLs I
4 think is also well-briefed and well-reasoned, including in your
5 most recent decision of *Ghanatt vs. Numerade*, which although it
6 was a VPPA case, also assessed whether or not a URL was
7 content, and there, consistent with *In Re -- In Re Real-Time*
8 *Bidding* and also with the prior rulings in this case, we agreed
9 that full URLs, which basically show examples of the pages, are
10 indeed content.

11 And we believe that there is numerous other cases, for
12 example, by other courts in this circuit and elsewhere that we
13 cited in our briefing here which demonstrate.

14 **MS. NIX-HINES:** Mr. Mao sent over like five or six,
15 maybe seven cases this morning, Your Honor. We have not had a
16 chance to dig in on them. So we request the ability to reserve
17 until such time as we have had an opportunity to delve into
18 those cases.

19 **THE COURT:** I'm not going to look at them. You all
20 have briefed enough. If I need additional briefing -- I don't
21 know what you're talking about. I'm sorry. It must have
22 been -- I missed it.

23 **MS. NIX-HINES:** That's fine with me, Your Honor. We
24 only received them this morning, so -- he just referred to one,
25 but we have not had a chance to dig in on that.

1 **THE COURT:** I did not write it down, and I've got
2 pages of briefing from you all. The only thing I wrote down
3 was the new Judge Chen case.

4 Fifth claim, breach of contract.

5 I'm not sure that with respect to 5-1, that I am going to
6 do any of the lines 4 through 14. Just delete them all.

7 This is breach of contract. You all argue it. I'm just
8 going to give them the elements and the law. That's my job.
9 You can argue whatever you want, as long as there's evidence
10 for it.

11 I tell you what. I'm not going to hear any argument on
12 the breach of contract. I'm going to write what I think is
13 appropriate. I'll show it to you, and then you can tell me
14 whether some law is missing, because so much of what I see in
15 here is just argument. So we'll get to that.

16 All right. Moving to six, invasion of privacy.

17 **MS. NIX-HINES:** Your Honor --

18 **THE COURT:** Hold on.

19 **MS. NIX-HINES:** Sorry.

20 **THE COURT:** All right. Let's start with CACI 1800.

21 **MS. NIX-HINES:** So, Your Honor, if I may, I think, you
22 know, these two claims, invasion of privacy and intrusion of
23 seclusion, require some context because plaintiffs have
24 fundamentally misapprehended the distinction between an
25 invasion of privacy claim under the California constitution,

1 Article I, Section 1, and an intrusion upon seclusion claim
2 which emanates from the common law tort.

3 And so because of that fundamental misapprehension, they
4 are applying CACI 1800, but that applies to -- well, it
5 emanates from intrusion into private affairs. That's what it
6 is called, but it applies to the analogous common law tort of
7 intrusion upon seclusion. An invasion of privacy claim, which
8 as Your Honor probably recalls, came from Proposition 11 of the
9 privacy initiative amendment as a product of California's
10 peculiar but certainly endemically California process of
11 getting propositions, and this was intended to expand the
12 constitutional right of privacy. And, therefore, it's -- its
13 standards are found in judicial precedent, not in the CACI.

14 **THE COURT:** Before I got this case, did Judge Koh
15 issue a ruling with respect to the elements of this in a motion
16 to dismiss?

17 **MS. BONN:** She did, Your Honor. And I think her order
18 is essentially consistent with virtually all of the orders on
19 these two privacy torts out of this district, which is
20 essentially the elements are the same. The core elements is
21 was there an objectively reasonable expectation of privacy.

22 **THE COURT:** What's the difference? Objectively the
23 same between the sixth claim and the seventh claim?

24 **MS. BONN:** Correct, Your Honor. I think the only real
25 difference --

1 **THE COURT:** Why do you have both if you don't need
2 both?

3 **MS. BONN:** I think that there's arguably a distinction
4 that may matter, which is when you look at the California case
5 law -- and there is a *Shulman* case on this that we cite --
6 intrusion upon seclusion tends to be particularly focused on a
7 space or an area in which a plaintiff has an expectation of
8 privacy and the defendant has intruded into that private space.

9 And so to the extent there's a difference between the
10 elements, I think an invasion of privacy could be broader or
11 different than that, but an intrusion upon seclusion under
12 California case law, the *Shulman* case, is really focused upon
13 intruding into a private area.

14 **THE COURT:** Then why do you have the seventh claim?

15 **MS. BONN:** Because we think that both have been done
16 here. I mean, number one, there has been an intrusion onto
17 people's device and their private browser, which we think is an
18 area in --

19 **THE COURT:** So the tort of intrusion under *Shulman*,
20 quote, encompasses unconsented to physical intrusion into the
21 home, hospital room, or other place of privacy of which is
22 legally recognized, as well as unwarranted sensory intrusion,
23 such as eavesdropping, wiretapping, and visual or photographic
24 spying.

25 **MS. BONN:** Yes.

1 **THE COURT:** I see.

2 **MS. BONN:** There is also, I guess, one further
3 distinction we disagree with, but Google has taken the position
4 that the invasion of privacy claim under the constitution
5 cannot provide damages as a remedy, so we disagree. We think
6 both provide those remedies, but Google has taken a position
7 that there is an important distinction between the two claims
8 with respect to the remedy.

9 **THE COURT:** I see.

10 **MS. NIX-HINES:** Your Honor, with respect to the
11 invasion of privacy instruction, plaintiffs have left out
12 important elements that are found in the case law, including
13 the requirement that plaintiffs have to prove a legally
14 protected privacy interest in the data. And then also there is
15 a debate between the parties about whether the standard is
16 substantial and highly offensive or, as we argue, that it
17 constitutes an egregious breach of the social norms. And,
18 again, this is where they confuse the common law tort of
19 intrusion upon seclusion and using CACI 1800 versus judicial
20 precedent, which unequivocally applies the egregious breach of
21 the social norm standard.

22 And we have some of those cases --

23 **THE COURT:** What's the difference? Define each.

24 **MS. NIX-HINES:** We do define "egregious" --

25 **THE COURT:** So --

1 **MS. NIX-HINES:** -- "breach." Let's turn to that.
2 That's on page 178. And there we draw directly from the case
3 law indicating that --

4 **THE COURT:** Okay.

5 **MS. NIX-HINES:** "Egregious breach of social norms" --
6 sorry.

7 **THE COURT:** So plaintiffs' proposal suggests that they
8 consider all the evidence, including the degree of invasion and
9 that's the extent and gravity of the invasion. That's your sub
10 A.

11 So what's the difference between considering the degree of
12 invasion and the extent and gravity of the invasion?

13 **MS. NIX-HINES:** Your Honor, again --

14 **THE COURT:** Look, I have to -- you don't agree so
15 that's why I'm forced to look at the actual words. What is the
16 difference substantively? I understand that there are some
17 words that are different, but it doesn't seem to me that there
18 is a substantive difference between the jury considering the
19 degree of invasion and the extent and gravity of the invasion.
20 Do you agree?

21 **MS. BONN:** I agree.

22 **MS. NIX-HINES:** Agreed, Your Honor. That one is --

23 **THE COURT:** All right. So then next, you disagree
24 that they should consider the context, conduct, and
25 circumstances surrounding the invasion? Do you disagree with

1 that? I mean, your sub B is argument. I'm not going to give
2 sub B. You can argue that.

3 With respect to routine commercial behavior, this is all
4 argument. You can say -- you can argue, hey, this is routine
5 commercial behavior. How can that be egregious? That's
6 argument. I'm not going to tell them that as a matter of law.
7 You argue that. That's the context, conduct, and circumstances
8 surrounding the invasion. They're going to say it's egregious.
9 You're going to say it's routine commercial. That's what
10 argument is. It's not -- it's not a proper basis for an
11 instruction.

12 **MS. NIX-HINES:** I understand, Your Honor. And I will
13 certainly defer to you on what the language ultimately looks
14 like. I guess the point I would make is we think it would be a
15 mistake to blend the standards of 631 and 632 because they have
16 different roots: One is constitutional, one is common law.
17 And so we think that to do justice to both, we should use the
18 language that each one uses and then obviously --

19 **THE COURT:** That's legal argument, which I can
20 appreciate. All right.

21 So 631 you said is based in?

22 **MS. NIX-HINES:** The constitution, California
23 constitution, Article I, Section 1, for invasion of privacy.

24 **THE COURT:** And 632 is common law.

25 **MS. NIX-HINES:** Common law. Tort, intrusion upon

1 seclusion.

2 **THE COURT:** All right.

3 **MS. NIX-HINES:** Oh, sorry. I'm sorry, Your Honor. I
4 was reverting back to CIPA. We're talking about invasion of
5 privacy, the constitutional claim, versus the intrusion upon
6 seclusion, which is the common law tort. And there we do apply
7 the analogous CACI 1800.

8 **THE COURT:** For the seventh claim.

9 **MS. NIX-HINES:** Correct.

10 **THE COURT:** All right.

11 Any other distinctions with respect to 6 or 7? Yes, no,
12 maybe so?

13 **MS. NIX-HINES:** With respect to the seventh claim on
14 harm, Your Honor, we have no countervailing proposal. And we
15 believe that plaintiffs inappropriately -- and they do this in
16 a number of places in the instructions. They apply the BAJI
17 rather than the CACI.

18 As you know, the CACI supersedes the BAJI, and we don't
19 understand why they continue to use it. They seem to
20 cherry-pick language that they prefer.

21 **THE COURT:** So I use CACI first, use BAJI second.

22 **MS. BONN:** Can I address that for the harm issue which
23 comes across in numerous instructions?

24 So CACI, in general, assumes that jurors are going to
25 understand what a harm is by virtue of reading the damages

1 instructions, which in many cases might work. You know, an
2 individual plaintiff says, *You recorded me in my dressing room*
3 *and I'm seeking emotional distress damages and they're in this*
4 *amount*, that is all going to be laid out in the damages
5 instruction. But in this case, the damages we're seeking are
6 for unjust enrichment, disgorgement essentially, and then this
7 screenwise fair packet value of data, and that is an
8 appropriate damage measure, but in addition, as the Court
9 recognized in summary judgment, there is an essential harm by
10 virtue of having one's privacy invaded.

11 And BAJI has some instructions on harm in the privacy
12 context that explain that the injury to one's peace of mind
13 from the loss of privacy is a cognizable harm. So that's why
14 specifically with respect to the harm instruction across the
15 privacy torts, we ask that the Court take a look at the BAJI
16 instruction on harm because we're not sure that without some
17 instruction that tells the jury look, you can find a fact of
18 harm by virtue of, you know, the loss of privacy itself, it is
19 a legally recognizable harm, they might just look at these
20 damage instructions and go, *Okay, well, this talks about unjust*
21 *enrichment and this talks about fair market value, but what*
22 *tells me -- how I do know if the plaintiffs were harmed? They*
23 *didn't lose a leg.*

24 So I think it's appropriate to look at those privacy harm
25 instructions.

1 **MS. NIX-HINES:** And, Your Honor, if I may, we think
2 those very things are improper, peace of minds, injury to
3 feelings, because they've never pleaded them. And, in fact, in
4 their responses to Interrogatory No. 3 when plaintiffs were
5 asked, you know, what are the harms, none of them, not one,
6 identified peace of minds or injury to feelings. And so we
7 think it's too late in the game to try and expand notions of
8 harm.

9 And, in addition, you know, they're seeking to include
10 purported remedies that they claim they're entitled to like
11 disgorgement of profits resulting from unjust enrichment and an
12 inhibited ability to participate in a market, but those are not
13 harms under the common law invasion of privacy, and they should
14 not be allowed to bootstrap their damages theories into an
15 instruction on harm.

16 **MS. BONN:** Briefly, I disagree. The Internet Facebook
17 Tracking case at the Ninth Circuit made clear that one's right
18 under California law to seek a disgorgement or an unjust
19 enrichment is a sufficient harm to confer standing on these
20 claims, so we think the jury is entitled to hear that if the
21 plaintiffs had their privacy rights invaded and they would have
22 a right to recover unjust enrichment, that that in and of
23 itself -- they may find that that is sufficient to constitute a
24 harm.

25 **THE COURT:** Consent. We are now at page 199.

1 **MS. NIX-HINES:** Your Honor is turning to the
2 affirmative defense of consent?

3 **THE COURT:** Unless I missed it. Did I miss something?
4 We're at affirmative defenses. First one, that's 8.2. Yep.
5 8.2, consent.

6 I take it there is no basic instruction?

7 **MS. BONN:** I don't think so, Your Honor.

8 **MS. TREBICKA:** No, Your Honor, there is not.

9 **THE COURT:** All right. I'll read what you have to
10 say.

11 Anything that you want to add on 8.2 or 8.3?

12 **MS. BONN:** I'd like to make a couple of key points,
13 which I think is where the core dispute is between the parties.

14 One is that -- and it's clear from the restatement on
15 torts, it's clear from this Court's ruling on summary judgment,
16 Judge Koh's prior ruling, that consent has to be proportionate
17 to the disclosure, that the practice has to be clearly
18 disclosed. That concept of the proportionality we think has to
19 be included within the instruction, and that to the extent that
20 Google's conduct exceeded the scope of what is disclosed, they
21 could find a lack of consent as to the portion that's been
22 exceeded.

23 Those two concepts are in ours, and we don't think that
24 they're fairly included within Google's. One could quibble
25 with the language, but I think it was hard for us to reach

1 agreement because we couldn't even agree on the premise that
2 those two points need to be in there.

3 And then the third point is that plaintiffs have argued --
4 and Google never moved for summary judgment to defeat this
5 argument or this claim -- that the parties' contract in the
6 privacy policy during all relevant times has included the
7 explicit consent provision which says "Google will not reduce
8 your rights under this privacy policy without your explicit
9 consent." And we think the jury should be able to interpret
10 that provision.

11 And our argument is that if they agree with our
12 interpretation, it means Google cannot advance arguments that a
13 plaintiff impliedly consented. And so that concept is in here
14 as well.

15 Google has taken the position that somehow the Court has
16 rejected our argument as to this contractual provision as a
17 matter of law on the merits in its class certification order,
18 and I don't think the Court did any such thing.

19 **THE COURT:** If that's the case, then -- I have to go
20 back and look. Did I address that issue?

21 **MS. BONN:** Your Honor stated --

22 **THE COURT:** If -- if what you're saying is accurate,
23 then the issue of implied consent would have been -- would have
24 had common evidence.

25 **MS. BONN:** That's our point of view. And --

1 **THE COURT:** And I didn't -- and I found to the
2 contrary.

3 **MS. BONN:** You found that it would be -- implied
4 consent would be an individualized issue.

5 **THE COURT:** Correct.

6 **MS. BONN:** However -- because I think, look, at this
7 trial, Google might prevail. They might convince the jury that
8 we're wrong about our reading of that contract and we're wrong
9 about what the explicit consent provision means, but it's a
10 fact issue as to what that provision means.

11 The Court did not discuss the explicit consent provision,
12 other than to state what plaintiffs argued. The Court said
13 plaintiffs argue that the explicit consent provision --

14 **THE COURT:** But I ruled against you.

15 **MS. BONN:** You did. On class certification. But not
16 on summary judgment. Not that as a matter of law, we could not
17 prevail on our interpretation of what that provision means.

18 **THE COURT:** I'm not sure I would exclude Google from
19 making that argument when I ruled against you on that topic.

20 **MS. BONN:** No. I'm not saying that Google should be
21 precluded from making the argument. I'm saying we shouldn't be
22 precluded either. I'm saying let's put that provision to the
23 jury, say, *Look, plaintiffs are arguing that we will not reduce*
24 *your rights without your explicit consent means Google is not*
25 *going to rely on implied consent.* And Google is going to come

1 to the jury and say, *That's not what we mean by that.* I don't
2 know what they're going to say it means. They've never really
3 told us what they think it means.

4 But whatever they think it means, they can present the
5 other argument, and let's let the jury decide. All we are
6 asking for is that the jury be instructed what the import would
7 be, depending on who they agree with. If they agree with
8 Google, then they can consider implied consent. If they agree
9 with plaintiff, then they can't.

10 **MS. TREBICKA:** May I respond, Your Honor?

11 **THE COURT:** You may.

12 **MS. TREBICKA:** Plaintiffs are arguing for the
13 inclusion of a legal principle that the Court has rejected, and
14 that is a concern. The plaintiffs raised that issue.
15 Your Honor rejected it. And, in fact, it makes sense to have
16 been rejected because the phrase that plaintiffs are
17 identifying says "Google will not reduce your rights under this
18 privacy policy." It is not with -- with application to all
19 documents that constitute the contract. That's issue number 1.

20 Further, the plaintiffs' phrasing of this issue as a legal
21 matter is wrong because what they're arguing is that this
22 statement that the -- the plaintiffs' rights will not be
23 reduced without their explicit consent actually means that an
24 action -- that -- that is not an action by Google which would
25 implicate implied consent or an action -- or an action to

1 reduce users' rights. It's just user conduct. So it has no
2 place in the legal instruction on implied consent.

3 And that is the fundamental reason that Your Honor
4 rejected this with respect to implied consent. It has no place
5 in the jury instruction now with respect to implied consent.

6 **THE COURT:** Statute of limitations.

7 **MS. TREBICKA:** Your Honor, may I make -- opposing
8 counsel made a couple other points on this instruction on
9 affirmative defense. May I respond very briefly?

10 **THE COURT:** Briefly.

11 **MS. TREBICKA:** The fundamental reason that we could
12 not agree on the joint instruction here is because plaintiffs
13 believe that only three of their claims actually -- that --
14 that our affirmative defense of consent applies only to three
15 of their seven claims, and that is wrong as a matter of law.
16 As long as we cure that, I think we can find some ground, some
17 common ground here.

18 And also with respect to identifying additional strictures
19 on implied consent, I think we can again find some common
20 ground, but the strictures cannot be as argumentive as
21 plaintiffs have put them in their jury instructions, for
22 example, instructing the jury that Google must show that
23 plaintiffs consented to Google collecting, saving, and using
24 his or her private browsing data. So the details matter here,
25 Your Honor, and I think that's where we don't see eye to eye.

1 **THE COURT:** All right. We are going to take a break
2 from this case. I've got a criminal case that I forgot about.
3 Why don't you all come up.

4 (Pause in Proceedings.)

5 **THE COURT:** Back on the record, Brown vs. Google.
6 All right. Statute of limitations, 8-5.

7 **MS. FANI:** Your Honor, Teuta Fani for Google.

8 **THE COURT:** Okay. All right. Your disagreements
9 about the introduction, is there anything substantive?

10 **MS. FANI:** Yes, Your Honor. There is one significant
11 disagreement. I can distill it in a sentence, and that's
12 whether the statute of limitations bars liability or whether it
13 limits damages. And Google's position is there is no case law
14 that statute of limitations just limits damages. It's always
15 been a defense that bars liability. So --

16 **THE COURT:** Wasn't that an issue of law?

17 **MS. FANI:** Sorry, Your Honor?

18 **THE COURT:** Isn't that an issue of law?

19 **MS. FANI:** The statute of limitations?

20 **THE COURT:** Right. The effect of the statute of
21 limitations. Isn't that an issue of law?

22 **MS. FANI:** So it's not in this case because -- because
23 of the delayed discovery rule, so plaintiffs of arguing --

24 **THE COURT:** The effect of the statute of limitations
25 finding, isn't that an issue of law as opposed to the factual

1 issue with respect to when the statute begins to run?

2 **MS. FANI:** Yes. The effect is a legal --

3 **THE COURT:** Okay. This needs to be written as a
4 factual issue, not as a legal issue.

5 **MS. FANI:** So we followed CACI 454 for this -- both
6 parties substantially followed that CACI. We just disagree
7 with one insert.

8 So plaintiffs seek to add a limitation of damages insert,
9 and we clarify that it's -- it bars liability -- excuse me --
10 that it bars liability of a claim or a portion of a claim, but
11 for the most part, the parties adhere to --

12 **THE COURT:** Just stop.

13 **MS. FANI:** Okay.

14 **THE COURT:** Well, the first -- the -- at line 5 1/2,
15 Google's insert, red insert, is consistent with 454. What is
16 not consistent is its second insert at line 6 1/2.

17 So when you have a continuing violation, if -- if they
18 have harm that comes within the statute, it's viable harm.
19 You're seeking to exclude all of it, and that's just wrong so
20 that's going to be denied.

21 Next issue. 8-6, there's no dispute.

22 8-7, if you're wrong about the other, you may be wrong on
23 that one. I'm look at 455. And try to do it consistent to
24 CACI.

25 8-8. What is going on here?

1 **MS. FANI:** So this -- this instruction clarifies or
2 provides instruction to the jury for Google's affirmative
3 defense of limitation of liability, and plaintiffs object to it
4 in its entirety. And Google believes it should be given
5 because it's one of our defenses raised in the --

6 **THE COURT:** Why can't you argue this? And how am I
7 supposed to read a chart?

8 **MS. FANI:** So the chart just identifies --

9 **THE COURT:** You understand I have to read it; right?

10 **MS. FANI:** Yes, Your Honor.

11 **THE COURT:** You understand I have to sit here and read
12 it to them.

13 **MS. FANI:** Yes, Your Honor. And we just identify the
14 statements so if the issue is reading the chart --

15 **THE COURT:** Why can't you argue this? What is the law
16 in here that needs to be read by the judge as opposed to the
17 litigants arguing their case?

18 **MS. FANI:** So the law that the plaintiff -- the jury
19 needs to be instructed on is how to interpret --

20 **THE COURT:** What are the lines? Give me the lines
21 that reflect the law as opposed to the argument.

22 **MS. FANI:** So right before the chart, Your Honor, we
23 say to the jury, "You must decide whether the following
24 statements from the contract preclude liability for Google's
25 receipt of the at-issue data during the corresponding time

1 period."

2 **THE COURT:** I'm not so sure. I'll look at it more
3 closely later. It seems awfully odd. And I take it there is
4 no -- yeah. And there's zero kind of CACI instruction for this
5 kind of thing.

6 **MS. FANI:** This is similar to our instruction on the
7 parties' disputed terms of contract. So --

8 **THE COURT:** So it goes all -- look, and I don't like
9 your breach of contract instructions, which I have to probably
10 redo in their entirety.

11 I'll take a look at it in the context of the breach of
12 contract instructions.

13 And the same thing probably goes for waiver. Where is the
14 law? CACI 336?

15 **MS. FANI:** So waiver is actually based on CACI 336,
16 but I will yield to my colleague. Ms. Trebicka is going to
17 cover that one.

18 **THE COURT:** So contract instruction.

19 **MS. FANI:** Yes, Your Honor.

20 **THE COURT:** I will look at it then when I go back and
21 do those. All right.

22 Waiver is the intentional relinquishment of a known right
23 after knowledge of the facts, *Roesch vs. DeMota* 20 -- Supreme
24 Court of California.

25 **MS. TREBICKA:** Your Honor, we've used the CACI 336,

1 but if it would please Your Honor, we can redo it, provide a
2 different instruction that uses that California court cite that
3 you just mentioned.

4 **THE COURT:** No. I'm just looking -- I just read the
5 first -- the first reference to authority, and I was a little
6 bit surprised because -- are you arguing waiver after -- after
7 the filing of the lawsuit?

8 **MS. TREBICKA:** We're -- well, Your Honor, we believe
9 that the waiver argument goes beyond that. It's both express
10 waiver and implied waiver. One of the pieces of evidence that
11 we will argue is, for example, continued use of the private
12 browsing after the filing of the lawsuit, but that's not the
13 only piece of evidence that will apply to that claim -- or to
14 that instruction.

15 **MS. BONN:** May I be heard briefly on that, Your Honor?

16 **THE COURT:** Go ahead.

17 **MS. BONN:** Thank you, Your Honor.

18 Google pled a waiver affirmative defense in its Answer in
19 which it only appeared to cite explicit contract documents
20 between the parties as an example. So we served an
21 Interrogatory No. 9 where we asked them to explain the factual
22 bases for all of their affirmative defenses, and on March 9th
23 of 2022, just before the close of discovery, Google responded,
24 and at page 16 they said, "11the affirmative defense
25 waiver/estoppel, plaintiffs explicitly exculpated Google for

1 the conduct alleged through their contractual agreements with
2 Google," and then they cite and quote from the terms of
3 service.

4 So we asked Google to provide us in discovery with the
5 basis for their waiver defense, and they said they are only
6 relying on an explicit waiver based on the contents of the
7 parties' form agreement.

8 And now months later and after this was the subject of
9 extensive briefing in our Rule 23 petitions, Google says, *Well,*
10 *actually, we kind of told you we had consent defense, and*
11 *consent is substantially equivalent to waiver, and so now we*
12 *want to assert an implied waiver defense.* And the truth is
13 these are two very different standards. Waiver is subject to a
14 clear and convincing evidence standard.

15 And the problem that Google is facing is that at class
16 certification, they told the Court that consent, rather than
17 waiver, is the relevant defense to a breach of contract claim,
18 and yet under California law, it is not. There is no CACI
19 pattern instruction under the contract Section 300 for consent
20 to a contract. The relevant standard is a waiver.

21 And so Google pled waiver based on the contract itself.
22 It's a different standard. It's subject to clear and
23 convincing evidence. And now they're sort of impliedly
24 admitting that maybe there is a difference because they want
25 the waiver instruction, not just a consent instruction, but

1 they want the waiver instruction to be on an implied waiver
2 when in discovery, we served the necessary interrogatory to ask
3 them for the basis of their waiver defense, and they said the
4 basis is that plaintiffs explicitly exculpated Google through
5 their contractual agreement.

6 **THE COURT:** All right. Response.

7 **MS. TREBICKA:** Let me cut through some of that
8 conjecture, Your Honor, and go back to the 11th affirmative
9 defense, which is the defense of waiver where we very
10 specifically state that -- and I'm quoting, the -- that, "The
11 TAC," which is the Third Amended Complaint, "and each cause of
12 action stated therein is barred in whole or in part by the
13 doctrines of waiver and estoppel."

14 And then separately "and because plaintiffs explicitly
15 exculpated Google for its conduct." Those are all bases --

16 **THE COURT:** You were asked to explain in your
17 discovery responses the basis. Did you do that or not?

18 **MS. TREBICKA:** We did respond, Your Honor. I'll have
19 to --

20 **THE COURT:** You said you did not?

21 **MS. TREBICKA:** No. We did respond, Your Honor. And
22 I'll have to --

23 **THE COURT:** Did you respond -- that's -- that's what
24 their argument is here. And they've said that you failed to
25 identify this basis in discovery, and if you did, you may have

1 waived it. Not the -- use the same term, but I did.

2 So I need a response on her issue with respect to your
3 failure to disclose it during discovery.

4 **MS. TREBICKA:** Yes, Your Honor.

5 So we did respond citing to the explicit exculpation in
6 the discovery response. However, throughout litigation, we
7 maintained, as we did in our affirmative defense in the
8 pleading, in our answer, that there is a separate waiver
9 affirmative defense, and plaintiffs never contested that up
10 until now.

11 In fact, at the class certification stage, plaintiffs
12 repeatedly recognized that Google has an implied waiver defense
13 to the breach of contract claim, and there is no ambiguity
14 there, Your Honor.

15 The plaintiffs' class certification reply -- it's Docket
16 712-1 at page 3 -- where they recognize --

17 **THE COURT:** Is this not in your response.

18 **MS. TREBICKA:** Sorry, Your Honor?

19 **THE COURT:** In your 500- or 300-page document, do I
20 have that?

21 **MS. TREBICKA:** You do, Your Honor.

22 **THE COURT:** Okay.

23 **MS. TREBICKA:** Would you like a page number?

24 **THE COURT:** Well, I'm looking at it now. I'm just
25 asking if it's in here.

1 **MS. TREBICKA:** It is in there, Your Honor.

2 **THE COURT:** All right. That's all I need then.

3 Next.

4 **MS. TREBICKA:** Your Honor, I wasn't done on the waiver
5 issue, but --

6 **THE COURT:** We're going to run out of time here.
7 We've been on the record since 9:00. I have to take a felony
8 plea.

9 **MS. TREBICKA:** Understood, Your Honor.

10 The waiver is in there, is my parting word. It is a
11 crucial defense, affirmative defense, that we included in our
12 answer.

13 **THE COURT:** But you understand that just including it
14 in the Answer is not enough if you didn't follow up with your
15 discovery obligations.

16 **MS. TREBICKA:** We did follow up with discovery
17 obligations and in briefing, Your Honor, and it was never
18 contested up until now.

19 **THE COURT:** As long as you understand you have
20 obligations and you cannot just rely on something that was
21 filed at the beginning.

22 **MS. TREBICKA:** Yes, Your Honor.

23 **THE COURT:** And I will check because at this point, I
24 don't know who to believe.

25 Damages. I don't want any argument because you all don't

1 agree on much of anything of this, and there's a lot to do, and
2 we aren't going to do it in 15 minutes.

3 What I do need -- what's today. I want it by 9:00 a.m. on
4 Friday, I want an editable version of just the -- of just the
5 instructions. No argument. So strip out everything that
6 you've put in here in Docket 1057 and just give me an editable
7 version and strip out all the signature blocks and everything
8 else of the instructions themselves so I can work on them.
9 Send it to the proposed order mailbox.

10 **MS. TREBICKA:** Would you like the authorities as well,
11 Your Honor?

12 **THE COURT:** No. I have your documents. I will
13 cross-reference them. I want it -- I want a clean version of
14 that document.

15 **MS. TREBICKA:** Assuming with the red and the blue --

16 **THE COURT:** Yes, please. All right.

17 **MS. TREBICKA:** I know we're running out of time. We
18 did skip through a couple of affirmative defense instructions
19 in the middle, that my colleague, Ms. Nix-Hines, was prepared
20 to address, including the -- the a -- 8.3 and 8.4, Your Honor.

21 **THE COURT:** Is there anything else you all want to
22 discuss in these final minutes other than that?

23 **MS. BONN:** No.

24 **THE COURT:** Anything else on the defense side?

25 **MS. TREBICKA:** No, Your Honor.

1 **THE COURT:** All right. Then 8.3 and 8.4 -- well, that
2 was consent, and we've had a loss of discussion about consent.

3 **MS. NIX-HINES:** Yes, Your Honor. Just very briefly,
4 because I know it's getting late, the big difference between
5 our instruction and plaintiffs' is that plaintiffs' instruction
6 only pertains to the affirmative defense if the websites
7 consented. The law is actually that either the plaintiffs or
8 the websites consent. If we can prove either of those, then we
9 succeed on that affirmative defense, and so we --

10 **THE COURT:** I think they disagree with you obviously
11 on the law, and that's already been argued today, so take a
12 look at it.

13 **MS. NIX-HINES:** Thank you, Your Honor.

14 **MR. MAO:** Just two quick points on that.

15 First of all, there is a difference between the federal
16 and the state on the one-party to two-party consent. So
17 Google's argument with regard to the ECPA is that they have the
18 website's consent. Obviously we disagree.

19 But that in itself is not going to be sufficient for CIPA,
20 which is clear, every secondary authority agrees, not even
21 Google disagrees, that it requires two-party consent.

22 Second thing, Your Honor, as we've laid out in all of the
23 instructions on consent, consent requires an actual choice, and
24 here Google has never ever disputed that users do not have an
25 actual choice on whether they can be tracked, T-R-A-C-K-E-D.

1 We believe that -- that consent requiring a choice should be
2 part of the consent instruction.

3 **THE COURT:** Okay. Anything else?

4 **MS. NIX-HINES:** Just to refer you to a couple of cases
5 in our mini brief, *In Re Meta Pixel* and *Rodriguez vs. Google*
6 bot establish -- two cases I am pointing Your Honor to, *In Re*
7 *Meta Pixel Healthcare*, 2022 Westlaw 17869218 at 12, and
8 *Rodriguez vs. Google*, 2021 Westlaw 2026726 at 6, both of which
9 establish that there is no liability under the Wiretap Act
10 where one party consents.

11 We think that is black letter law that needs to be
12 included in the affirmative defense instruction.

13 And then finally, Your Honor, turning to the 8.4, invasion
14 of privacy justified, Your Honor, we have followed CACI 1807
15 with minor modifications to identify which claims this applies
16 to, but it's a correct statement of the law, and it's a
17 necessary instruction for the jury. It's important that they
18 understand that there could be no liability if Google can show
19 that it's conduct was justified. And we've set forth, pursuant
20 to the CACI, that standard as well as the rationales that
21 Google will seek to show were -- proved that its conduct was
22 justified, to the extent plaintiffs can establish any
23 wrongdoing in the first instance.

24 **MR. MAO:** Your Honor, we believe that one is well
25 briefed. It's our responses to that --

1 **THE COURT:** All right. I'll look at it.

2 **MS. NIX-HINES:** With that, Your Honor, we thank you
3 for your time and your patience and appreciate the fulsome
4 hearing you've given us today.

5 **THE COURT:** Okay. I'll be in touch. We're adjourned.

6 (Proceedings adjourned at 3:07 p.m.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Sunday, December 3, 2023

Pamela Batalo Hebel

Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter